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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

TRAIL MOUNTAIN COAL COMPANY,

Petitioner,

v.

THE UTAH DIVISION OF STATE LANDS AND FORESTRY; RALPH MILES, DIRECTOR OF THE DIVISION OF STATE LANDS AND FORESTRY; THE UTAH DEPARTMENT OF NATURAL RESOURCES; DEE HANSEN, EXECUTIVE DIRECTOR OF THE UTAH DEPARTMENT OF NATURAL RESOURCES,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Utah

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Utah law allows parties to a contract either to select their own interest rate to apply upon contractual breach or to have a statutory rate applied if none other is specified. In a 1965 mining lease, the State of Utah and Petitioner chose the 6% statutory rate by not specifying a different rate in their contract. In 1982, a State administrative board unilaterally raised the interest rate on unpaid mining royalties to 18%. In 1985, the State administratively determined that Petitioner owed unpaid royalties dating from 1979 and that the new interest rate applied retroactively to these royalties, increasing the State's contractual recovery by over $4,000,000. Accordingly, the question presented is:

> Where a State has entered into a contract with a particular interest rate, does the State violate the Contract Clause by unilaterally changing that interest rate to increase its recovery under the contract?

PARTIES TO THE PROCEEDINGS

All parties to this proceeding are listed in the caption. Sup. Ct. R. 14(1)(b).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Trail Mountain Coal Company ("Trail Mountain") respectfully petitions for a writ of certiorari to review the judgment of the Utah Supreme Court below.

OPINIONS BELOW

The opinion of the Utah Supreme Court (App. A 1a) is reported at 921 P.2d 1365, and reaffirms an earlier opinion of the Utah Supreme Court in a related case (App. E 41a) reported at 886 P.2d 514. The judgment (App. C 31a) and findings of fact and conclusions of law (App. D 33a) entered by the trial court are not reported.

JURISDICTION

The opinion of the Utah Supreme Court was issued on June 28, 1996. App. A 1a. A timely petition for rehearing was denied on August 23, 1996. App. F 81a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 10, Clause 1 of the United States Constitution provides, in pertinent part:

> No State shall * * * pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts * * *.

Utah Code Ann. § 15-1-1 (1953), during the period relevant here provided:

> (1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.
>
> (2) Unless the parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 6% per annum.

STATEMENT

This case, arising out of the breach of a mineral lease issued by the State of Utah, raises the question whether

a State may retroactively (and dramatically) alter its contractual rights without encountering the constitutional limits established by the Contract Clause. The Utah Supreme Court has decreed that the State of Utah did not impair a "contractual term of [a State] Lease" (App. A 8a) by retroactively setting aside a statutory interest rate incorporated into that Lease and replacing it with an administratively imposed rate some 300% higher. App. E 79a (Bench, J., dissenting). This holding not only conflicts with this Court's long-standing judgment that statutes "affect[ing] the validity, construction and enforcement of contracts" *are* subject to Contract Clause scrutiny (*General Motors Corp. v. Romein*, 503 U.S. 181, 189 (1992); *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 550 (1867)), it also conflicts with recent federal appellate authority (*In re Workers' Compensation Refund*, 46 F.3d 813 (8th Cir. 1995)) and ignores the original intent animating the Contract Clause. *The Federalist* No. 44 at 282 (James Madison) (C. Rossiter ed., 1961). Review is warranted to remedy the Utah Supreme Court's disregard of settled constitutional principle and ensure that other state courts do not follow Utah's lead.

1. The Mineral Lease

The Trail Mountain Mine is located west of Orangeville, Utah. Included in the mine is State Coal Lease No. ML-22603 (the "Lease"). App. A 2a. The Lease, dated February 8, 1965, was issued to Trail Mountain's predecessor-in-interest on a standard form drafted by the Utah Division of State Lands and Forestry (the "Division"). *Id.*

The Lease grants the right to remove and sell minerals from "school trust lands." Such lands, granted by Congress to the State, are managed by the Division under regulations established by the Utah Board of State Lands and Forestry (the "Board") for the "sole benefit of the common schools." App. E 61a-63a. The Lease provides for the payment of royalties at the higher of two alternative rates: "at the rate of 15¢ per ton," or "at the rate prevailing * * * for federal leases of land of similar char-

acter under coal leases issued by the United States at that time." App. A 3a.

Utah law authorizes "[t]he parties to a lawful contract * * * [to] agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract." Utah Code Ann. § 15-1-1(1) (1953). As drafted by the State of Utah, the Lease did not contain any provision setting a specific rate for prejudgment interest upon contractual breach. Accordingly, the calculation of prejudgment interest for breach of the Lease was governed by the plain language of Utah Code Ann. 15-1-1(2) (1953):

> Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 6% per annum.[1]

2. The Royalty Dispute

When the Lease was issued, federal coal leases specified a 15¢ per ton royalty payment. App. B 16a. In August of 1976, however, the federal government changed the method for computing the royalties on federal mineral leases. Rather than a cents-per-ton charge, all new federal leases were issued with a royalty rate of "eight percent of the value of the coal produced." *Id.* The new federal percentage royalty raised the question, for the first time, whether Lease royalties were payable at 15¢ per ton or (under the alternative royalty clause) "at the rate prevailing . . . for federal leases of land of similar character under coal leases issued by the United States at that time." App. A 3a.

Following the change in the royalty rate for newly issued federal leases, and on instructions from the State, Trail Mountain (along with other State lessees) con-

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[1] The current version of § 15-1-1(2) provides a 10% legal rate of interest. Utah Code Ann. § 15-1-1(2) (1992). The revised statute, however, "is not applicable" to any contract made before May 14, 1981. App. A 4a n.5.

tinued to pay the 15¢ per ton royalty. In Trail Mountain's case, "various Division employees * * * informed Trail Mountain that 15 cents per ton was the correct rate for the Lease." App. A 4a. This instruction was based upon the Division's determination that, under the plain language of the Lease, the alternative royalty clause did not apply until producing "Federal leases in the same area" as a State Lease were adjusted to the new (and higher) percentage royalty rate. App. I 87a.

In 1985, the Division conducted an audit of "various coal leases." App. B 17a. The audit was premised upon an entirely new reading of the Lease's alternative royalty clause. Rejecting its prior determination that the alternative rate was triggered "at such time" as new "Federal leases in the same area" as a State Lease "begin[] production" (App. I 87a), the Division concluded that the alternative royalty clause applied from the moment the federal government issued *any* new leases on a percentage, rather than a cents-per-ton, basis. Under this new interpretation, Trail Mountain had underpaid its royalty obligation through 1985 by $3,351,474.75. App. A 4a.

The Division also claimed the State was entitled, not only to prejudgment interest on the unpaid royalties, but to prejudgment interest at a significantly higher rate than the 6% provided by Utah Code Ann. § 15-1-1(2) (1953). In 1982, the Utah Board of State Lands and Forestry had adopted regulations providing for 18% interest on unpaid royalties. App. G 82a.[2] The Division asserted that, notwithstanding the 6% prejudgment interest rate incorporated into the contract by the operation of § 15-1-1(2), Trail Mountain was obligated to pay the Board's dramatically higher interest rate. So calculated, Trail Moun-

[2] In 1986, the Board changed the rate again—this time to a floating rate indexed against the "Prime Rate" (plus a penalty of 4%). Rather than providing for simple interest, the Board designed the 1986 rate to compound, significantly accelerating the rate at which interest accrued. As applied, the 1986 revised rate guaranteed the State a simple rate of return in excess of 17% on unpaid coal royalties. App. G 82a.

tain owed $6,105,638.22 in interest through March 1992 (App. H 85a), rather than the $2,070,955.93 accruing under § 15-1-1(2) during the same period. App. C 32a. The Division justified its retroactive trebling of Trail Mountain's prejudgment interest obligation on the ground that the State was entitled to receive "full value" for the lease of school trust assets. App. A 6a. *Cf. Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 466 (1967) (states must obtain "full value" for the disposition of school trust lands).

3. Lower Court Proceedings

After exhausting its administrative remedies, Trail Mountain filed an action in state district court to enjoin the Division from collecting additional royalties and prejudgment interest at the newly imposed interest rate. App. A 4a-5a. The trial court initially concluded that the alternative royalty clause was impermissibly vague and, therefore, unenforceable. App. E 45a. The Division appealed that decision to the Utah Supreme Court, which consolidated Trail Mountain's case with three other challenges to the Division's new interpretation of the State's standard coal lease. App. A 5a. The Utah Supreme Court reversed and remanded.

On remand, the trial court adopted the Division's new reading of the alternative royalty clause. The trial court concluded that, although the alternative royalty clause was "ambiguous," Trail Mountain nevertheless "had the legal obligation to pay the higher rate commencing at the time the federal rate was increased to 8%." App. D 35a, 38a. But, while holding that Trail Mountain had breached the Lease by underpaying royalties, the trial court rejected the Division's assertion that the State could recover prejudgment interest in excess of the 6% set by § 15-1-1(2).

In reliance upon settled Utah law,[8] the court held that the Division was only entitled to collect "the legal rate in effect at the time the Lease was executed." App. D 39a.

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[8] *Ringwood v. Foreign Auto Works, Inc.*, 786 P.2d 1350, 1358 (Utah Ct. App. 1990) (absent a contrary agreement regarding

> The Board [of State Lands and Forestry] had no right by regulation to change the monetary obligation undertaken by [Trail Mountain in] the Lease. If such authority were allowed, the Board could set any arbitrary rate that it saw fit and rewrite the monetary obligation under the Lease.

Id.; compare United States Trust Co. v. New Jersey, 431 U.S. 1, 25-26 (1977) ("If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all"). The obligation of the State to receive "full value" for school trust properties, the court concluded, was fulfilled by the State's receipt of "the legal rate of interest on delinquent payments." App. D 39a.

On cross appeals by Trail Mountain and the State, the Utah Court of Appeals affirmed the trial court's conclusion that Trail Mountain was obligated to pay additional royalties. App. B 19a-21a. The court of appeals, however, also affirmed the lower court's refusal to award the Division prejudgment interest in excess of 6%.

The court of appeals recognized that, unless the parties to a lawful contract agree to a specific interest rate, "Utah

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prejudgment interest, "Utah law provides that the legal rate is applicable in instances where the parties have not agreed on a specified rate"), *cert. denied*, 795 P.2d 1138 (Utah 1990); *Mont Trucking, Inc. v. Entrada Indus. Inc.*, 802 P.2d 779, 782 (Utah Ct. App. 1990) (absent a contrary specified rate, upon a finding of breach of contract, "[t]he trial judge [is] * * * required as a matter of law to award the statutorily mandated rate"); *Vassels v. LoGuidice*, 740 P.2d 1375, 1378 (Utah Ct. App. 1987) (citing *Golden Key Realty, Inc. v. Mantas*, 669 P.2d 730 (Utah 1985)) (prejudgment interest "accrue[s] as damages arising out of a valid contract determined to have been breached by the other party"); *SCM Land Co. v. Watkins & Faber*, 732 P.2d 105, 108-109 (Utah 1986) (allowing prejudgment interest at six rather than ten percent because the "lease that was breached was executed prior" to the increase in the legal rate); *Davies v. Olson*, 746 P.2d 264, 270 (Utah Ct. App. 1987) (statutory rate in force at time contract is executed applies).

law establishes [a 6%] rate of prejudgment interest." App. B 28a. The court concluded that the Division lacked the power to "deviat[e] from the statutory rate of prejudgment interest." *Id.* "Were we to rule otherwise," the court held, "the State Land Board could simply change the material terms of a lease by subsequent unilateral fiat." *Id.*

4. Decisions Below

A. *Consolidation Coal:* While the present matter was pending in the Utah Court of Appeals, the Utah Supreme Court accepted review of another case challenging the legal validity of the Division's new construction of Utah's standard coal lease. *Consolidation Coal Co. v. Utah Div. of State Lands and Forestry*, 886 P.2d 514 (1994) (App. E 41a). In *Consolidation Coal*, issued shortly after the Utah Court of Appeals ruled in this case,[4] the Utah Supreme Court held that a lessee in the position of Trail Mountain was obligated to pay the alternative percentage royalty. App. E 48a-57a. The court then concluded (without once adverting to possible Contract Clause implications) that the lessee was obligated to pay the State's retroactively imposed 18% prejudgment interest rate. App. E 60a.

One member of the *Consolidation Coal* panel, however, dissented on the express ground that the retroactive prejudgment interest rate violated the Contract Clause. Judge Bench, a member of the Utah Court of Appeals sitting by designation, concluded that because "the parties [to the mineral lease] did not specify a prejudgment interest rate," the 6% rate established by "section 15-1-1 was incorporated by operation of law into the contract." App. E 78a (Bench, J., dissenting). As a result, the Division's abrogation of that contractual term ran "headlong into constitutional prohibitions." App. E 77a. According to Judge Bench, "[t]he State has no authority to modify,

[4] The court of appeals' opinion in this case was entered on October 27, 1994. App. B 14a. The Utah Supreme Court's opinion in *Consolidation Coal* was entered on December 2, 1994. App. E 41a.

unilaterally and at-will, the statutory interest rate in effect when the parties entered into the contract." App. E 74a.

> It is a fundamental principle of constitutional law that a state may not pass a law altering the nature and legal effect of an existing contract to the prejudice of either party to the contract. * * * It is likewise a fundamental principle of constitutional law that the state may not pass a law altering a contractual remedy when the remedy is material to the contract. *Kirkman v. Bird*, 22 Utah 100, 111-12, 61 P. 338, 339-40 (1900).

App. E 77a (citation and parenthetical omitted).

B. *Trail Mountain:* Following *Consolidation Coal*, the Utah Supreme Court granted review in this case. The court concluded that Trail Mountain was obligated to pay additional royalties under the alternative royalty clause and held that the Board was entitled to suspend the operation of Utah Code Ann. § 15-1-1(2) and collect, instead, the 18% interest rate established by its regulations. App. A 10a. The Utah Supreme Court also explained (for the first time) why this result did not violate the Contract Clause.

The court noted that the Lease "was 'granted subject in all respects to and under the conditions of the laws of the State of Utah and existing rules and regulations and such operating rules and regulations as may be hereafter approved and adopted by the State Land Board.'" App. A 3a (quoting Lease). In reliance on this contractual provision, the court held that "when the Division sought to enforce" the new "interest and penalty measures," it was "merely acting pursuant to a right it held under the contract, and no contractual term of the Lease was impaired." App. A 8a. *But cf.* App. E 63a (Utah Supreme Court, in *Consolidation Coal*, holding that § 15-1-1(2) "would apply" to calculation of prejudgment interest absent the Board's retroactive rate).

The Utah Supreme Court conceded that this Court, in *General Motors Corp. v. Romein*, 503 U.S. 181 (1992),

had reaffirmed that " 'state laws are implied into private contracts regardless of the assent of the parties' " when " 'those laws affect the validity, construction, and enforcement of contracts.' " App. A 9a (quoting *Romein*, 503 U.S. at 189). Straightforward application of *Romein*, of course, would yield the conclusions (1) that Utah Code Ann. § 15-1-1(2) was incorporated into the Lease because the statute controls the calculation of contractual damages and, therefore, (2) the State's replacement of a 6% statutory rate with an 18% interest rate unconstitutionally impaired the Lease obligation undertaken by Trail Mountain. *Accord, Kirkman v. Bird*, 22 Utah 100, 111-12, 61 P. 338, 339-40 (Utah 1900) ("The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is therefore void").

The Utah Supreme Court, however, avoided these obvious results by proclaiming that "regulations which altered the rate of prejudgment interest over time did not affect the 'validity, construction, [or] enforcement' of the contract between Trail Mountain and the Division" because the "regulations simply affected the calculation of the remedy granted for a breach of the terms of the Lease." App. A 10a. According to the court, the State of Utah's retroactive trebling of Trail Mountain's prejudgment interest obligation under the Lease "did not alter any of the essential elements of the contract." App. A 8a n.8.

REASONS FOR GRANTING THE PETITION

Review is warranted for three reasons.

First, the Utah Supreme Court's conclusion that "no contractual term of the Lease was impaired" (App. A 8a) by the State's deletion of Utah Code Ann. § 15-1-1(2) from its mineral lease conflicts with (indeed, disregards) this Court's opinion in *General Motors Corp. v. Romein*, 503 U.S. 181 (1992). *Romein* announced that statutes which "affect the validity, construction, and enforcement

of contracts" *are* implied into * * * contracts" and *are* subject to Contract Clause scrutiny. *Romein*, 503 U.S. at 189. Contrary to the Utah Supreme Court's remarkable declaration that "regulations which altered the rate of prejudgment interest over time did not affect the * * * enforcement of the [State's] contract" (App. A 10a) (internal quotations omitted), Utah's replacement of an incorporated 6% interest term with a newly minted 18% rate unquestionably constituted a "substantial" impairment of a "contractual relationship." *Romein*, 503 U.S. at 186.

Second, the Utah Supreme Court's total disregard of the Contract Clause conflicts, not only with the controlling precedent of this Court, but with the Founders' design and a recent federal circuit court decision. The Clause was crafted for the express purpose of moderating "the fluctuating policy" that could otherwise "direct[] the public councils." *The Federalist* No. 44 at 282 (James Madison) (C. Rossiter ed., 1961). The Clause can hardly stand as a "constitutional bulwark in favor of personal security and private rights" (*id.*) if States are permitted to augment their contractual rights at will. Indeed, precisely because of this fact, the United States Court of Appeals for the Eighth Circuit has recently repudiated the precise reasoning adopted by the Utah Supreme Court. *In re Workers' Compensation Refund*, 46 F.3d 813 (1995).

Third, and finally, review is warranted to ensure the continued validity of "a simple constitutional principle: government *must keep its word.*" Laurence H. Tribe, American Constitutional Law, § 9-10, at 619 (2d ed. 1988) (emphasis in original, footnotes omitted). Just last Term, the Court reaffirmed the fundamental rule that, when government " 'enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.' " *United States v. Winstar Corp.*, 116 S.Ct. 2432, 2464-2465 (1996) (quoting *Lynch v. United States*, 292 U.S. 571,

579 (1934) (Brandeis, J.)). No *private* contractor would be permitted retroactively to augment its contractual rights by over $4 million. The State of Utah should not be ceded the identical (and, in its hands, tyrannical) power. *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

I. THE DECISION BELOW CONFLICTS WITH *ROMEIN*

The decision of the Utah Supreme Court rests upon two interrelated assertions: (1) because the " 'Lease is expressly subject to the laws of Utah,' " the State can alter its contractual remedies at will (App. A 8a), and (2) the State, in any event, can supplant Utah Code Ann. § 15-1-1 (2) without impairing a "contractual term." *Id.* The first submission warrants review because it disregards the original intent animating the Contract Clause and the careful limits erected by the federal courts to circumscribe the power of a State to alter its own contracts. Sections II, III, *infra; Romein*, 503 U.S. at 190-191 (rejecting the Utah Supreme Court's first assertion); *In re Workers' Compensation Refund*, 46 F.3d 813 (8th Cir. 1995) (same). The second submission, for its part, conflicts with numerous pronouncements from this Court (most recently in *Romein*). The Court should grant review to prevent other state courts from emulating Utah's blithe disregard of the controlling Contract Clause pronouncements of this Court.

1. The first step in Contract Clause analysis is "whether [a] change in state law has 'operated as a substantial impairment of a contractual relationship.' " *Romein*, 503 U.S. at 186 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). That inquiry has "three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Romein*, 503 U.S. at 186. Here, the Lease plainly establishes a contractual relationship between the State of Utah and Trail Mountain. The Utah Supreme Court, however, concluded that the State's nullification of § 15-1-1(2) did

not alter a "contractual term." App. A 8a. This is plain error.[5]

To begin with, the statute involved here *expressly* furnishes a contractual term: "[u]nless the parties to a lawful contract specify a different rate of interest," the Utah Code proclaims that "the legal rate of interest for the loan or forbearance of any money, goods, or chose in action *shall* be 6% per annum." Utah Code Ann. § 15-1-1(2) (emphasis added). Implicit in this statutory scheme is the command that, absent contrary agreement by the parties, all contracts in the State of Utah require payment of prejudgment interest at the "legal rate." *Accord*, Utah Code

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[5] The Utah Supreme Court cited only one case to support its result, *Morely v. Lake Shore & Mich. S. Ry.*, 146 U.S. 162, 168-71 (1892). *Morley*, however, is not on point and in fact *rejects* the reasoning of the Utah Supreme Court.

Morley sustained legislative alteration of *postjudgment* interest against a Contract Clause challenge. 146 U.S. at 168-172. But, in so doing, this Court expressly distinguished prejudgment interest, which "is in the nature of damages" for contractual breach and cannot be legislatively altered (146 U.S. at 168), from postjudgment interest, which "duty is created by the statute, and not by the agreement of the parties." 146 U.S. at 169. This case, of course, involves a prejudgment interest obligation created "by the agreement of the parties" that operates to provide relief "in the nature of damages" 146 U.S. at 168-169. *Accord, L&A Drywall, Inc. v. Whitmore Const. Co.*, 608 P.2d 626, 629 (Utah 1980) (rejecting the argument that "prejudgment interest" under § 15-1-1(2) is "independent of the terms of [an] agreement itself" because the argument is a "fallacious characterization" of Utah law; "'[p]rejudgment interest' represents an amount awarded as damages due to the opposing party's delay in tendering the amount owing under an obligation"); *Vali Convalescent and Care Institts. v. Div. of Health Care Fin.*, 797 P.2d 438, 445 (Utah Ct. App. 1990) (rejecting the contention that § 15-1-1(2) "creates a statutory right to interest;" the statute "does nothing more than define what the rate of interest should be in those instances where interest accrues as a matter of law but no specific rate has been agreed to"). According to *Morley*, an "amount awarded as damages due to the opposing party's delay in tendering the amount owing under an obligation" (*L&A Drywall, Inc.*, 608 P.2d at 629) is *not* subject to legislative alteration. *Morley*, 146 U.S. at 168. *Morley*, therefore, refutes rather than supports the Utah Supreme Court's holding.

Ann. § 15-1-1(1) (authorizing parties to "agree upon any rate of interest" to supplant the "legal rate" provided by subsection (2)); authority cited at *supra* note 3. In these circumstances, the general rule that " 'the laws which subsist at the time and place of the making of a contract * * * enter into and form a part of it' " (*Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-430 (1934) (quoting *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 540 (1867)) has special force.

This Court, in fact, has specifically noted that pre-judgment interest statutes, such as § 15-1-1(2), *are* incorporated contractual terms. In *Von Hoffman v. City of Quincy*, the Court (after noting that contemporaneous state laws are incorporated into a contract) concluded that:

> [t]his principle embraces alike those [laws] which affect [a contract's] validity, construction, discharge, and enforcement. *Illustrations of this proposition are found, in the obligations of the debtor to pay interest after the maturity of the debt, where the contract is silent. * * *. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement.*

Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) at 549; *accord, Edwards v. Kearzey*, 96 U.S. 595, 600 (1877) (the "obligation of a contract includes every thing within its obligatory scope" and "[a]mong these elements nothing is more important than the means of enforcement. This is the breath of its vital existence").

The result mandated by *Von Hoffman*, moreover, has recently been reaffirmed. Just four years ago, this Court declared that "state laws are implied into private contracts regardless of the assent of the parties" when "those laws affect the validity, construction, and enforcement of contracts." *Romein*, 503 U.S. at 189. The *Romein* Court explained at some length why certain laws are subject to Contract Clause analysis:

> While it is somewhat misleading to characterize laws affecting the enforceabiilty of contracts as "incorporated terms" of a contract, see 3 A. Corbin, Contracts § 551, pp. 199-200 (1960), these laws are subject to Contract Clause analysis because, without them, contracts are reduced to simple, unenforceable promises. "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. * * * If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract." *McCracken v. Hayward*, 2 How. 608, 612 (1844). See also *Van Hoffman v. City of Quincy, supra.* * * * For this reason, changes in the laws that make a contract legally enforceable may trigger Contract Clause scrutiny if they impair the obligation of pre-existing contracts, even if they do not alter any of the contract's bargained-for terms. See, e.g., *Von Hoffman v. City of Quincy, supra*, (repeal of tax designed to repay bond issue); *Bronson v. Kinzie*, 1 How. 311, 316 (1843) (law limiting foreclosure rights); *McCracken v. Hayward, supra*, 2 How. at 611-64 (same).

Romein, 503 U.S. at 189-190.

The decision below unquestionably conflicts with *Romein*. The statutory obligation to pay 6% interest upon breach had " 'binding force' " on Trail Mountain at the time the Lease was executed and was " 'the measure of the obligation to perform' " assumed by the company. *Romein*, 503 U.S. at 189 (quoting *McCracken*, 2 How. at 612). The State's retroactive trebling of that duty " 'necessarily bears on the obligation of the contract.' " *Id.* Accordingly, the State of Utah's retroactive imposition of $4 million in additional prejudgment interest upon Trail Mountain undeniably—and substantially[6]—"impair[s] the

[6] As a result of the retroactive interest rate imposed upon Trail Mountain, the company's prejudgment interest obligation has mush-

obligation of [a] pre-existing contract[]." *Romein*, 503 U.S. at 189.

2. The Utah Supreme Court's bald evasion of this Court's established precedent from *Von Hoffman* through *Romein* merits review. Whether or not a contract has been unconstitutionally impaired is a question of federal—not state—law. *Romein*, 503 U.S. at 187. As the Court explained in *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938):

> in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation.

The Court "must answer * * * [t]hese questions * * * independently of the conclusion of th[e state] court," for "we can not perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action unless we give the questions independent consideration." *Appleby v. City of New York*, 271 U.S. 364, 379-380 (1926); *see also Municipal Investors Ass'n v. Birmingham*, 316 U.S. 153, 157 (1942); *Irving Trust Co. v. Day*, 314 U.S. 556, 561-562 (1942).

In this case, the Court has a clear "duty to enforce the guaranty of the Federal Constitution" (*Appleby*, 271 U.S. at 379-380) because the Utah Supreme Court has read Trail Mountain's contract in a manner that effectively renders the Contract Clause "a dead letter." *Brand*, 303 U.S. at 100. The State of Utah's retroactive displacement of a 6% contractual term with an interest rate three times higher does not involve a "generally applicable rule of conduct designed to advance 'a broad societal interest' " where Contract Clause concerns may well be incidental.

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roomed to over $6 million (App. H 85a), a figure three times the amount owing under § 15-1-1(2) and nearly double the underpaid royalty obligation upon which the interest award is based. App. C 32a.

Exxon Corp. v. Eagerton, 462 U.S. 176, 191 (1983) (*quoting Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249 (1978)). On the contrary, the State's action involves a State-fashioned "rule limited in effect to contractual obligations or remedies." *Id.*

Moreover, the prejudgment interest rate imposed by the State of Utah is not only aimed at "contractual obligations or remedies," *it is aimed at the State's own contractual rights. Exxon Corp.*, 462 U.S. at 191, 192 n. 13 (emphasizing the "special concerns associated with a State's impairment of its own contractual obligations").[7] If the State of Utah's retroactive 300% augmentation of its *own* contractual rights is permitted to stand, it is difficult to conceive of *any* future action by the State that *will* trigger Contract Clause scrutiny. The Clause, at least in Utah, will become a mere artifact.

There is also grave danger that—absent review—the Contract Clause will be seriously debilitated beyond the borders of Utah. The Utah Supreme Court's analysis not only conflicts with decisions from this and other courts (*Romein*, 503 U.S. at 189; *In re Workers' Compensation Refund*, 46 F.3d at 818-819),[8] it could

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[7] *Accord, In re Workers' Compensation Refund*, 46 F.3d 813 at 820 (8th Cir. 1995) ("Although states have broad discretion under their police powers to regulate existing contractual relationships, such regulation must protect a 'broad societal interest rather than a narrow class' " in order to insure "that 'the State is exercising its police power, rather than providing a benefit to special interests' ") (*quoting Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249 (1978), and *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983)).

[8] *E.g., Caritas Servs., Inc. v. Dep't of Social and Health Servs.*, 869 P.2d 28, 36 (Wa. 1994) ("Parties are generally deemed to contract in reliance on existing law"); *Ass'n of Surrogates and Supreme Court Reporters v. State*, 588 N.E.2d 51, 53 (N.Y. Ct. App. 1992) ("When the contracts were negotiated, the existing statutes . . . were incorporated into them and continued as part of the agreement until new agreements were executed. . . . [T]he obligation of the contracts included 'not only the express terms but also the contemporaneous state law pertaining to [their] interpretation

well serve as a hornbook for future "creative avoidance" of the Contract Clause in other jurisdictions. Every state in the nation has a prejudgment interest statute that operates similarly to § 15-1-1(2).[9] Numerous states, further-

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and enforcement' ") (quoting *United States Trust Co. v. New Jersey*, 431 U.S. at 19-20 n.17); *Wynne v. New Orleans Clerks and Checkers Union, Local 1497*, 550 So.2d 1352, 1354 (La. App. 1989) (" 'It is a fundamental principle that laws existing at the time a contract is entered into are incorporated into a contract and form a part of the contract as though expressly written therein' ") (quoting *Board of Comm'rs v. Dept. of Natural Resources*, 496 So.2d 281, 294 (La. 1986)); *State ex rel. Cannon v. Moran*, 331 N.W.2d 369, 374 (Wis. 1983) ("Courts have long recognized that under the contract clause a contract includes the laws existing at the time it was made"); *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1244 (3d Cir. 1986) (" 'The obligations of a contract have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement' ") (quoting *Blaisdell*, 290 U.S. at 429-430), *cert. denied*, 484 U.S. 963 (1988); *In re LaFortune*, 652 F.2d 842, 846 (9th Cir. 1981) ("the laws which existed at the time the contract was entered into and which affect its validity, construction, discharge and enforcement, in effect, are incorporated within the contract").

[9] Ala. Code §§ 8-8-8 (1993); Alaska Stat. §§ 09.30.070 (1994); Ariz. Rev. Stat. Ann. § 44-1201 (Supp. 1994); Ark. Code Ann. § 16-65-114 (1987); Cal. Civ. Code §§ 3287 to -3291 (1970 & West Supp. 1996); Colo. Rev. Stat. 5-12-101 to -102 (1996); Conn. Gen. Stat. Ann. §§ 37-1 to -3-1(a) (Supp. 1996); Del. Code Ann. Tit. 6, §§ 2301, 2303 (1993); Fla. Stat. Ann. § 55.03 (West Supp. 1996); Ga. Code Ann. §§ 7-4-12 to -15 (1989); Haw. Rev. Stat. §§ 478-2 to -3 (1993 & Supp. 1995); Idaho Code § 28-22-104 (1996); Ill. Rev. Stat. Ch. 735 § 5/2-1303 (1993); Ind. Code Ann. §§ 24-4.6-1-101 to -103 (1995 & Burns Supp. 1996); Iowa Code Ann. §§ 535.3 (1987 & West Supp. 1996); Kan. Stat. Ann. §§ 16-201 to -205 (1995); Ky. Rev. Stat. Ann. §§ 360.010, .040 to .050 (1987); La. Rev. Stat. Ann. § 13-4203, La. Civ. Code art. 2924 (1991 & Supp. 1996); Me. Rev. Stat. Ann. Tit. 14, § 1602 (Supp. 1995); Md. Code Ann. Courts § 11-106 (1986); Mass. Ann. Laws Ch. 231, §§ 6c (1986); Mich. Comp. Laws § 600.6013 (Supp. 1996); Minn. Stat. Ann. § 334.01 (1994); Miss. Code Ann. §§ 75-17-1 and -7 (Supp. 1995); Mo. Ann. Stat. § 408.020 (1990); Mont. Code Ann. 27-1-211 (1993); Neb. Rev. Stat. §§ 45-103-103.04 (Supp. 1995); Nev. Rev. Stat. §§ 17.130(2), 99.040 (1995); N.H. Rev. Stat. Ann.

more, manage public trust properties under obligations to obtain full (or fair) value upon their disposition.[10] The decision below—by demonstrating how prejudgment interest statutes can be ignored and public trust responsibilities exploited—is an enticing outline for the constitutionally effective rewriting of thousands of contracts held by financially strapped States. *Cf. United States Trust Co. v. New Jersey*, 431 U.S. 1, 25-26 (1977) ("A governmental entity can always find a use for extra money, especially when taxes do not have to be raised").

The Court should grant review to prevent unwarranted erosion of the Contract Clause in Utah and elsewhere. As set out in the next Section, the Contract Clause was drafted precisely to prevent fluctuating [State] policy" from retrospectively upsetting legitimate economic expectations.

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§§ 336:1 -:2, 524:1-a to -b (1984 & 1995 Supp.); N.J. Stat. Ann. § 31:1-1 (1990); N.M. Stat. Ann. § 56-8-3, -4 (1996); N.Y. Civ. Prac. Law §§ 5001-5004 (McKinney 1992 & Supp. 1996); N.C. Gen. Stat. § 24-1, -5 to -7 (1995); N.D. Cent. Code § 32-03-03, -04 and -09 (1996); Ohio Rev. Code Ann. §§ 1343.01-.03 (1993); Okla. Stat. Ann. tit. 12, § 727 (1988 & Supp. 1996); Or. Rev. Stat. § 82.010 (1995); 41 Pa. Const. Stat. Ann. § 202 (1992 & Supp. 1996); R.I. Gen. Laws §§ 9-21-8, -10 (1985 & Supp. 1995); S.C. Code Ann. §§ 11-9-350, 34-31-20, 37-10-106 (1987 & Supp. 1995); S.D. Codified Laws Ann. § 21-2-1 to -10 (1987 & Supp. 1996); Tenn. Code Ann. §§ 47-14-121 to -123 (1995); Tex. Stat. Ann. § 5069-1.05 (Supp. 1996); Vt. Stat. Ann. tit. 9, § 41a(a) (1993); Va. Code Ann. § 6.1-330.54 (1993); Wash. Rev. Code Ann. §§ 4.56.110, 6.44.090, 19.52.010 to .020 (1991 & Supp. 1996); W.Va. Code § 56-6-29 to -31 (1966 & Supp. 1996); Wis. Stat. Ann. §§ 138.04, 815.05(8) (1989 & 1995); Wyo. Stat. § 40-14-106(e) (1993).

[10] States manage lands under a variety of trust doctrines; state and federal trust doctrines often require states "to sell or rent the lands only for fair market value." George Cameron Coggins et al., 1 *Public Natural Resources Law* § 10C.02[8]; *see, e.g., Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 466 (1967); *see also Dept. of State Lands v. Pettibone*, 702 P.2d 948 (Mont. 1985); *Kanaly v. State*, 368 N.W.2d 819, 824 (S.D. 1985); *County of Skamania v. State*, 685 P.2d 576 (Wa. 1984); *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230, 235 (Okla. 1982); *State v. Univ. of Alaska*, 624 P.2d 807 (Alaska 1981); *Anderson v. Bd. of Educ. Lands & Funds*, 256 N.W.2d 318 (Neb. 1977).

The Federalist No. 44 at 282 (James Madison) (C. Rossiter ed., 1961). Review is necessary to preserve this basic mission of the Clause.

II. THE OPINION BELOW DISREGARDS THE ORIGINAL INTENT ANIMATING THE CONTRACT CLAUSE AND CONFLICTS WITH A RECENT COURT OF APPEALS DECISION

The court below held that the State of Utah had the right to alter its contractual remedies at will because the Lease, as issued, was " 'subject to the laws of Utah.' " App. A 8a. This argument improperly disregards the original intent animating the Contract Clause and conflicts with a recent decision from the United States Court of Appeals for the Eighth Circuit. *In re Workers' Compensation Refund*, 46 F.3d 813 (8th Cir. 1995). As the Eighth Circuit has recognized, the Contract Clause was written into the Constitution expressly *to deprive* the States of the very power exercised by the State of Utah. Review is warranted, not only to preserve the Founders' intent, but to restore uniform application of the Contract Clause in both state and federal courts.

In *The Federalist* No. 10, perhaps the most important of the Federalist papers, Madison stated that "the protection of [the] faculties of acquiring property" is "the first object of government." *The Federalist* No. 10 at 78 (James Madison) (C. Rossiter ed., 1961).[11] Madison particularly feared the threat to property resulting from "[t]he mutability of the laws of the States," and wrote that the "injustice" and "evils issuing from" frequent changes in state laws "contributed more to the uneasiness which

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[11] *See also* Schwartz, *Old Wine in Old Bottles? The Renaissance of the Contract Clause*, 1979 Sup. Ct. Rev. 95, 120; McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Calif. L. Rev. 267, 270 (1988); Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J. L. & Econ. 467, 469-470 (1976); E. Johnson, *The Foundations of American Economic Freedom* 191-192 (1973); J. Nedelsky, *Private Property and the Limits of American Constitutionalism* chs. 2, 5 (1990).

produced the [Constitutional] Convention" than any other inadequacy of the Articles of Confederation. 5 *The Writings of James Madison* 27 (letter of Oct. 24, 1787) (G. Hunt ed., 1904). Accordingly, the Contract Clause—a "constitutional bulwark in favor of personal security and private rights"—was designed precisely to prevent state legislation from upsetting legitimate economic expectations founded upon the law of contract. *The Federalist* No. 44 at 282 (James Madison) (C. Rossiter ed., 1961).[12]

The decision of the Utah Supreme Court improperly ignores this fundamental mission of the Contract Clause. The Utah court has decreed that—because the Lease is " 'subject to the laws of Utah' " (App. 8a)—Trail Mountain has no right to insist that the legal rights and duties created by the contract be enforced according to their terms. Rather, Trail Mountain must simply accommodate itself to the reality that the Lease can be continually refashioned to suit the State's current policy. This result is constitutionally insupportable. Although the Lease is subject to the laws of Utah, the laws of Utah are subject to

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[12] As Madison explained (*The Federalist* No. 44 at 282 (James Madison) (C. Rossiter ed., 1961)):

> The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community.

Alexander Hamilton similarly asserted that a law rescinding a state's obligations "may be safely said to be a contravention of the first principles of natural justice and social policy." B. Wright, *The Contract Clause of the Constitution* 22 (1938). *See also Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C. Pa. 1795) (Patterson, J.) ("The preservation of property * * * is a primary object of the social compact"); McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Calif. L. Rev. 267, 284 (1988) (Charles Pinckney asserted that the Contract Clause and other limitations of Art. I, § 10, cl. 1 were "the soul of the Constitution").

the Contract Clause. *Cf. United States v. Winstar Corp.*, 116 S.Ct. 2432, 2459 (1996) (government contracts "made in reliance on the law of contract" must be enforced) (Souter, J., joined by Stevens, Breyer, and O'Connor, JJ.); *id.* at 2477 (government contract rights are "dictated by normal principles of contract interpretation") (Scalia, J., joined by Kennedy and Thomas, JJ.).

Indeed, the Utah Supreme Court's conclusion that the Contract Clause has not been violated because the Lease is " 'subject to the laws of Utah' " (App. A 8a) directly clashes with a recent, important federal decision. *In re Workers' Compensation Refund*, 46 F.3d 813 (8th Cir. 1995). In that case, the Minnesota Legislature enacted a statute retroactively voiding various insurers' contractual rights to the refund of some $402 million in excess funds accumulated in a workers' compensation reinsurance pool. 46 F.3d at 817. Contracts between the State of Minnesota and the insurers created the reinsurance pool and established the right to the refund of the excess funds. The contracts, however, also expressly provided that they would " 'be deemed to be automatically amended to conform to any amendment' " of Minnesota law regulating the reinsurance pool. 46 F.3d at 818 (quoting contracts). The State of Minnesota argued that this "automatic amendment" clause avoided Contract Clause scrutiny of the State's retroactive abrogation of the insurers' contractual refund rights. *Id.*

This argument, identical to the Utah Supreme Court's submission below (App. A 8a), was rejected by the Eighth Circuit. The court reasoned (46 F.3d at 819):

> An expansive interpretation of the automatic amendment clause to permit complete retroactive amendment essentially deems all rights or obligations in those contracts illusory, because these rights could always be changed or obliterated. *See Continental Illinois Nat'l Bank and Trust Co. v. Washington*, 696 F.2d 692, 698 (9th Cir. 1983), *appeal dismissed*, 460 U.S. 1077 (1983). An expansive retroactive application also converts the automatic amendment

> clause into a blanket waiver of the insurance companies' right to Contract Clause protection. Contractual clauses purporting to waive constitutional rights must be clear and unambiguous. *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972).

Because the "retroactive amendment" clause did "not unambiguously divest all future rights for Contract Clause protection," the court of appeals concluded that Minnesota's retroactive abrogation of the refund was unconstitutional. 46 F.3d at 821.

The Utah Supreme Court's conclusion that the Board may alter its remedies at will because the Lease is subject to Utah law cannot be reconciled with *In re Workers' Compensation Refund*. The decision below—which announces that the State of Utah did not alter a "contractual term" in tripling its own damage recovery (App. A 8a)—renders Trail Mountain's rights under the Lease "illusory" because those "rights [can] always be changed or obligated." *In re Workers' Compensation Board*, 46 F.3d at 819. The decision below effectively assumes that Trail Mountain's predecessor-in-interest, by signing the Lease, executed a "blanket waiver of . . . Contract Clause protection" and thereby relinquished "all future rights for Contract Clause protection." *Id.* That assumption, however, is fatally flawed. *Romein*, 503 U.S. at 190-91 (rejecting the assertion that by " 'provid[ing] by a law * * * that all contracts thereafter made should be subject to the entire control of the legislature' " a state could "render the Contract Clause itself entirely dependent on state law") (quoting 2 J. Story, *Commentaries on the Constitution of the United States* § 1383 at 252-53 (5th ed., 1891)); *see also United States v. Winstar Corp.*, 116 S.Ct. at 2477 (a government promise "only 'to provide [certain] treatment unless and until there is subsequent action' " is "an absolutely classic description of an illusory promise") (Scalia, J., joined by Kennedy and Thomas, JJ.).

In the words of Madison, "Bills of attainder, ex post facto laws. and laws impairing the obligation of contracts,

are contrary to the first principles of the social compact and to every principle of sound legislation." *The Federalist* No. 44 at 282 (James Madison) (C. Rossiter ed., 1961). The decision of the Utah Supreme Court disregards this fundamental principle and conflicts with the Eighth Circuit's recent holding. The Court should review this case to clarify whether the Utah Supreme Court's approach or the analysis in *In re Workers' Compensation Refund* governs a State's rights under contracts "subject" to State law. App. A 8a. Absent such clarification, and to the extent that State courts follow the decision below rather than *In re Workers' Compensation Refund*, the Contract Clause could be drained of the very meaning ascribed to it by its authors.

III. REVIEW IS WARRANTED TO ENSURE THAT THE STATE OF UTAH KEEPS ITS WORD

Precisely because the Founders believed that retroactive legislative alteration of contractual rights was a serious breach of "social justice" (*The Federalist* No. 7 at 65 (James Madison) (C. Rossiter ed., 1961), the Contract Clause has particular vigor when States alter their own contractual rights. In this context, the Clause packs a potent punch. "There is no reason to allow the State to trick a group of individuals into parting with money on one set of conditions only to find that it is bound by another." Richard A. Epstein, *Toward a Revitalization Of The Contract Clause*, 51 U. Chi. L. Rev. 703, 720-721 (1984). Review is warranted because the State of Utah is constitutionally obligated to "*keep its word.*" Laurence H. Tribe, *American Constitutional Law*, § 9-10, at 619 (2d ed., 1988) (emphasis in original, footnotes omitted).

1. The heightened scrutiny applicable to a state's alteration of its own contractual rights was enunciated in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). "The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" *Energy Reserves Group, Inc. v. Kansas Power & Light*, 459 U.S. 400, 411 (1983) (quot-

ing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). If this threshold is met, a state law violates the Contract Clause unless it is supported by an "important public purpose" and is "reasonable and necessary to serve" that purpose. *United States Trust*, 431 U.S. at 22.

This analysis is not deferential "because the State's self-interest is at stake." *United States Trust*, 431 U.S. at 25-26 (footnotes omitted); *accord*, *Energy Reserves Group, Inc. v. Kansas Power § Light Co.*, 459 U.S. 400, 412 n. 14 (1983) ("When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets").[13] Neither impending

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[13] *See, e.g., Tyrpak v. Daniels*, 874 P.2d 1374, 1380 (Wa. 1994) (annexation of disputed port property was an unconstitutional impairment of a municipality's contracts with general obligation bondholders); *Caritas Servs., Inc. v. Dep't of Social and Health Servs.*, 869 P.2d 28, 35, 40 (Wa. 1994) (amendment reducing payments under nursing homes reimbursement act violates Contract Clause); *Bidwell v. City of Bellevue*, 827 P.2d 339 (Wa. App. 1992) (voter initiative which required convention center authority to obtain voter approval before issuing bonds unconstitutionally impaired the authority's contract with the city); *Carlstrom v. State*, 694 P.2d 1, 5 (Wa. 1985) (legislative abrogation of public teachers' previously negotiated pay raise violates Contract Clause); *19th Street Assocs. v. State*, 593 N.E.2d 265, 267 (N.Y. Ct. App. 1992) (legislative grant of new rights to tenants in derogation of state's prior consent judgment with landlord violates Contract Clause); *Ass'n of Surrogates & Supreme Court Reporters v. State*, 588 N.E.2d 51, 54 (N.Y. Ct. App. 1992) (legislative imposition of five-day lag payroll violated Contract Clause); *Bennett v. County of Nassau*, 393 N.E.2d 446, 449 (N.Y. Ct. App. 1979) (legislative abrogation of public employees' contractual right to receive cash payment for accumulated vacation pay and sick leave upon transfer violates Contract Clause); *Patterson v. Carey*, 363 N.E.2d 1146, 1152, 1153 (N.Y. Ct. App. 1977) (legislative reductions in tolls charged by parkway authority violates Contract Clause); *State ex rel. Cannon v. Moran*, 331 N.W.2d 369, 374-375 (Wis. 1983) (retroactive reduction in contractual pension benefits violates Contract Clause); *Christensen v. Minneapolis Mun. Employees Retirement Bd.*, 331 N.W.2d 740, 751-752 (Minn. 1983) (legislative discon-

"fiscal ruin," [14] other constiutional prerogatives,[15] nor the invocation of such concepts as "public trust" have been sufficient to validate significant alteration of a State's contractual rights and obligations.[16]

2. The State of Utah's alteration of Trail Mountain's Lease is unconstitutional under *United States Trust*. The State's abrogation of the 6% prejudgment interest rate established by Utah Code Ann. § 15-1-1(2) impaired a contractual relationship and that impairment (which in-

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tinuance of retired public employee's pension violates Contract Clause); *Condell v. Bress*, 983 F.2d 415, 418, 420 (2d Cir. 1993) (salary deferral program violates Contract Clause), *cert. denied*, 507 U.S. 1032 (1993); *Ass'n of Surrogates and Supreme Court Reporters v. State*, 940 F.2d 766, 773-774 (2d Cir.) ("lag payroll" law violated the Contract Clause), *cert. denied*, 502 U.S. 1058 (1991); *State of Nevada Employees Assoc., Inc. v. Keating*, 903 F.2d 1223, 1226, 1228 (9th Cir. 1990) (Nevada's termination of the right of public employees to withdraw pension contributions without penalty is an unconstitutional impairment of contractual obligations), *cert. denied*, 498 U.S. 999 (1990); *Continental Illinois Nat. Bank & Trust Co. of Chicago v. State*, 696 F.2d 692, 698, 701 (9th Cir. 1983) (initiative which imposed requirement of voter approval prior to public power authority's issuance of bonds violates Contract Clause), *appeal dismissed*, 460 U.S. 1077 (1983).

[14] *Opinion of the Justices (Furlough)*, 609 A.2d 1204, 1206 (N.H. 1992) (legislation requiring state employees to take unpaid leave violates Contract Clause; leave provision is unconstitutional even though it "is a budget-slashing device intended by the proponents to rescue the State from the prospects of fiscal ruin;" "[b]ased on the ample authority cited above, we find the bill neither reasonable nor necessary to serve an important public purpose" because "[t]he legislature has many alternatives available to it, including reducing non-contractual State services and raising taxes and fees," even though none "of these choices may be as politically feasible as the furlough program").

[15] *Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So. 2d 681, 683 (Fla. 1980) (State authority to regulate liquor under the 21st Amendment does not immunize State liquor legislation from Contract Clause scrutiny).

[16] *West Indian Co., Ltd. v. Gov't of the Virgin Islands*, 844 F.2d 1007 (3d Cir. 1988) ("public trust" doctrine does not avoid Contract Clause scrutiny), *cert. denied*, 488 U.S. 802 (1988).

increased Trail Mountain's prejudgment interest liability by over $4 million) was substantial. *Romein*, 503 U.S. at 186. And, even assuming that the impairment furthered a "significant and legitimate" interest (*Energy Reserves Group*, 459 U.S. at 411) in the administration of school trust property by bolstering the receipt of "full value" (App. A 6a), the State's action was neither "reasonable" nor "necessary" to further that interest. *United States Trust*, 431 U.S. at 25.[17]

To begin with, the Board-imposed 18% interest rate *reroactively* alters the State's contract. Whatever the vagaries of Contract Clause analysis, it has long been established that retroactive impairment of contractual obligations is forbidden. *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 250 (1978) (alteration of contractual obligations is unconstitutional when it "work[s] a severe, permanent, and immediate change in [contractual] relationships irrevocably and retroactively").[18]

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[17] *See, e.g., Christensen v. Minneapolis Mun. Employees Retirement Bd.*, 331 N.W.2d 740, 751 (Minn. 1983) ("correcting an inequity or a fiscal misjudgment can be a significant and legitimate public purpose, as the second prong of [the Contract Clause] test requires," but, even if a contractual alteration furthers such an interest, it is unconstitutional unless "necessary" to the furtherance of that interest; change in contractual pension benefits fails this test).

[18] Compare *Sturges v. Crowninshield*, 4 Wheat. (17 U.S.) 122 (1819) (New York law discharging debtors of their obligations upon surrender of their property violates the Contract Clause) *with Ogden v. Saunders*, 12 Wheat. (25 U.S.) 213 (1827) (state insolvency laws *can* be applied to contracts made *after* the law was enacted; *Sturges* applies only to retroactive insolvency laws).

Before the lower courts, the State of Utah asserted that the Board's 18% prejudgment interest rate is not "retroactive" because the rate is inapplicable to Trail Mountain until 1982 (the date the rate was first adopted). The Board's rate, however, is fullly retroactive. The Board has decreed (and the Utah Supreme Court has affirmed) that Trail Mountain is obligated to pay steep prejudgment interest beginning in 1982 for a contractual breach that occurred in 1979. The Board's interest 18% rate, in short, is retroactive—not only because it applies to a contract that was negotiated in 1965

In addition, the Board's penalties are not reasonable "in light of the surrounding circumstances." *United States Trust*, 431 U.S. at 31. When the Lease was negotiated, the State of Utah had the opportunity to obtain an agreement regarding the payment of prejudgment interest in excess of the 6% rate established by § 15-1-1(2) if, in the judgment of the State, a higher rate was necessary to insure the receipt of "full value" for the disposition of school trust asests. *E.g.*, Utah Code Ann. § 15-1-1(1) (1953) (permitting parties to stipulate "any rate of interest" for contractual breach). However, by not obtaining an agreement to pay a higher rate, the State necessarily concluded that a lessee's payment of the 6% "legal rate" would provide the State with "full value." *Accord*, App. D 39a (trial court finding that State would receive "full value" upon payment of the "legal rate of interest on delinquent payments"). Because the need to obtain full value for the Lease was "not unknown" when the Lease was issued, the State's retroactive conclusion that an 18% interest rate better serves its interests is plainly unreasonable. *United States Trust*, 431 U.S. at 32.

The Board-imposed interest rate, finally, is not only unreasonable, it is not *necessary* to further the State's interest in the protection of school trust lands. Even if the State, as the trustee of school trust lands, is somehow entitled to prejudgment interest higher than 6%, "full value" could not possibly validate the Board's 18% figure.

Prejudgment interest, of course, merely compensates the State for the time value of money it should have received under the Lease. *E.g.*, *L&A Drywall v. Whitmore Const. Co.*, 608 P.2d 626, 629 (Utah 1980) (prejudgment interest under § 15-1-1(2) represents "damages due to the opposing party's delay in tendering the amount owing under an obligation"). Beginning in 1982, when the Board sanctioned its 18% rate and continuing *every* quarter thereafter until this matter went to trial, the Board's

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long before it was adopted—but because it applies to a contractual lapse that occurred *prior* to its adoption.

interest rate significantly exceeded the rates of return received by the State on cash deposited in the school trust account—at times by as much as 10 percentage points. App. J 89a. The Board's extraordinarily high prejudgment interest rate, therefore, is hardly "necessary" to insure that the State is compensated for the time value of any money Trail Mountain improperly withheld from the school trust account. App. E 73a (Bench, J., dissenting) ("The requirement that the State receive full value at the time of the disposition of the State's interest is a far cry from authorizing the State unilaterally to modify material terms of its existing contracts").

"[A] State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *United States Trust*, 431 U.S. at 31. The interest rate imposed by the Board is not necessary to further the State's obligations as trustee of school trust lands and, therefore, is unconstitutional. The Utah Supreme Court's refusal to even acknowledge this point demands the Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 18, 1996

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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

TRAIL MOUNTAIN COAL COMPANY,

Petitioner,

v.

THE UTAH DIVISION OF STATE LANDS AND FORESTRY; RALPH MILES, DIRECTOR OF THE DIVISION OF STATE LANDS AND FORESTRY; THE UTAH DEPARTMENT OF NATURAL RESOURCES; DEE HANSEN, EXECUTIVE DIRECTOR OF THE UTAH DEPARTMENT OF NATURAL RESOURCES,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Utah

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

SUPREME COURT OF UTAH

No. 940556

TRAIL MOUNTAIN COAL COMPANY,
Plaintiff, Respondent, and Cross-Petitioner,

v.

THE UTAH DIVISION OF STATE LANDS AND FORESTRY; RALPH MILES, DIRECTOR OF THE DIVISION OF STATE LANDS AND FORESTRY; THE UTAH BOARD OF STATE LANDS AND FORESTRY; THE UTAH DEPARTMENT OF NATURAL RESOURCES; DEE HANSEN, EXECUTIVE DIRECTOR OF THE UTAH DEPARTMENT OF NATURAL RESOURCES,
Defendants, Petitioners and Cross-Respondents.

June 28, 1996, FILED

OPINION

STEWART, Associate Chief Justice:

This case involves a dispute between the Utah Division of State Lands and Forestry (the "Division") and Trail Mountain Coal Company ("Trail Moutain") concerning prejudgment interest and penalties assessed on delinquent lease payments. The lease in question was issued by the State of Utah. It permitted Trail Mountain to mine coal on a parcel of school trust lands near Orangeville, Utah.[1]

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[1] Pursuant to the Utah Enabling Act, the Utah Division of State Lands and Forestry manages school trust lands (granted to the

We granted the Division's petition for review of the Court of Appeals' decision upholding the trial court's ruling that the Division is not entitled to the interest and penalty rates assessed pursuant to regulations of the *Board of State Lands and Forestry* (the "Board"), 892 P.2d 13 (Utah 1995). We now reverse.

I. PROCEDURAL BACKGROUND

Trail Mountain's mine encompasses three separate leases. Trail Mountain entered into two of those leases with the federal government. The third lease is the state lease, ML-22603 (the "Lease"), involved in this controversy. It was originally issued to Malcolm McKinnon in 1965. McKinnon assigned the Lease to Myron F. Fetterolf in 1979, who later assigned it to Trail Mountain.[2] Between 1979 and 1985, the mine was in constant operation. The controversy now presented to us arises out of Trail Mountain's obligation pursuant to the royalty clause of the state-issued Lease. The relevant portions of that provision read as follows:

> The Lessee, in consideration of the granting of the rights and privileges aforesaid, hereby covenants and agrees as follows:
>
> . . . .
>
> To pay to Lessor quarterly, on or before the 15th day of the month succeeding each quarter, royalty

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State by the United States Government for the purpose of supporting the common schools), in accordance with the rules and regulations promulgated by the Board of State Lands and Forestry. See Utah Code Ann. §§ 65-1-18 to -23 (1986). For current provisions relating to the Board's management duties with respect to mineral leases, see section 65A-1-2 and chapter 6 of the same title.

[2] According to the Division, Trail Mountain was owned by the "Fetterolf Group, Inc.," and Trail Mountain was the entity which extracted the coal beginning in 1979, even though the Lease was not formally assigned to it until sometime later.

> (a) at the rate of $.15 per ton of 2000 lbs. of coal produced from the leased premises and sold or otherwise disposed of, or
>
> (b) at the rate prevailing, at the beginning of the quarter for which payment is being made, for federal lessees of land of similar character under coal leases issued by the United States at that time,
>
> whichever is higher.

The Lease also stated that it was "granted subject in all respects to and under the conditions of the laws of the State of Utah and existing rules and regulations and such operating rules and regulations as may be hereafter approved and adopted by the State Land Board."

When the Lease was originally issued in 1965, the standard royalty rate on similar federal leases was 15 cents per ton. Prior to 1976, Trail Mountain's predecessors in interest paid royalties under the Lease according to the amount specified in subsection (a) of the alternate royalties provision of the Lease (i.e., a flat rate of 15 cents per ton). In 1976, however, Congress enacted the Federal Coal Leasing Amendments Act. Pub. L. No. 94-377, 90 Stat. 1083 (1976), codified at 30 U.S.C. §§ 201-09. Pursuant to regulations promulgated under those amendments, coal removed from underground mines was presumptively subject to "a royalty of not less than 8 percent of the value of coal removed." 43 C.F.R. § 3473.3-2(a)(3) (1979). Thereafter, any new leases issued by the federal government for coal extraction from underground mines were generally subject to an eight percent royalty rate.[3] Trail Mountain's predecessors in interest and Trail Mountain, however, continued to pay under subsection (a) of the Lease.[4] Thus, from 1979

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[3] The regulations did allow an authorized officer to assess a lesser amount if special conditions warranted.

[4] Trail Mountain also held two federal leases operating out of the same mine. The first federal lease, U-082996, was issued in 1962, at a royalty rate of 15 cents per ton. In 1983, the second federal

through 1985, Trail Mountain paid a royalty of 15 cents per ton on all coal extracted from the school trust land subject to the Lease. The Division received these payments without protest, and various Division employees apparently informed Trail Mountain that 15 cents per ton was the correct rate for the Lease.

In 1984 and 1985, however, the Division conducted an audit of coal leases on school trust lands and concluded that subsequent to passage of the Federal Coal Leasing Amendments and accompanying regulations, companies extracting coal from underground mines on school trust lands had a duty to pay eight percent of the value of that coal. On October 15, 1985, the Division notified Trail Mountain that it had underpaid the required royalties by $3,351,474.75. The audit report also assessed $1,854,115.69 in interest and $16,606.76 as a penalty for late payment. The interest was calculated at six percent for the period of November 1, 1979, to June 30, 1981, on the basis of the statutory rate provided by Utah Code Ann. § 15-1-1; at ten percent for the period of July 1, 1981, to November 30, 1982, on the basis of the revised statutory rate;[5] and at eighteen percent for the period of December 1, 1982, to October 15, 1985, on the basis of a regulation adopted by the Board in November of 1982.[6] The penalty was based on a rule promulgated by the Division in December of 1983.

Trail Mountain contested these assessments. It exhausted its administrative remedies and then filed an ac-

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lease, U-49322, was issued at a royalty rate of eight percent of the value of the coal removed from the mine. At that time, Trail Mountain's other federal lease was likewise readjusted to the eight percent royalty rate.

[5] By its own terms, however, the revised statutory rate is not applicable "to any contract or obligations made before May 14, 1981."

[6] In 1986, subsequent to the billing period at issue in this case, an adjustable interest rate based on the rate charged by the Internal Revenue Service plus four percent was established.

tion in district court to enjoin the Division from collecting the back royalties, interest, and penalties. Trail Mountain argued that the Division had misinterpreted the royalty payment provision and, in any event, was estopped from claiming that Trail Mountain owed the sums assessed. The trial court granted Trail Mountain's motion for summary judgment. On appeal, Trail Mountain's case was consolidated with three others in *Plateau Mining Co. v. Division of State Lands & Forestry*, 802 P.2d 720 (Utah 1990). In that decision, this Court reversed the trial court and remanded for further proceedings. *Id.* at 732. The trial court subsequently conducted a three-day bench trial and determined that Trail Mountain had a duty to pay royalties at a rate of eight percent during the audit period (1979 to 1985). The court also assessed a six percent per annum interest charge on all deliquent payments during the same period. Trail Mountain appealed that judgment in most of its particulars. The Division cross-appealed, claiming that the trial court should have awarded a higher interest rate for certain portions of the audit period and additional late fees.

Contemporaneously, another of the Plateau Mining litigants, Consolidation Coal Company ("Consol") appealed from a similar trial court result. This Court accepted Consol's appeal for decision but transferred Trail Mountain's appeal to the Court of Appeals. See Utah Code Ann. § 78-2-2(4). In *Trail Mountain Coal Co. v. Division of State Lands & Forestry*, 884 P.2d 1265 (Ct. App. 1994), *cert. granted*, 892 P.2d 13 (Utah 1995), the Court of Appeals upheld the trial court's assessment of the eight percent royalty rate,[7] ruled that the Division's recovery

[7] The Court of Appeals did, however, reverse the trial court with respect to Trail Mountain's application for a transportation allowance deduction from the eight percent royalty. Such deductions are granted under federal leases. The Court of Appeals held that because the deduction is an integral factor in calculating the amount that would be due under federal leases, the same deduction is necessarily incorporated into the relevant state leasing provision requir-

was limited by the seven-year statute of limitations in Utah Code Ann. § 78-12-2, further ruled that interest and penalties had not begun to accrue prior to the Division's first demand for payment, affirmed the six percent prejudgment interest rate set by the trial court, and denied the Division's request for additional interest and penalty payments. 884 P.2d at 1269-73.

Trail Mountain was issued by the Court of Appeals on October 27, 1994. Shortly thereafter, on December 2, this Court issued its decision in *Consolidation Coal Co. v. Division of State Lands & Forestry,* 886 P.2d 514 (Utah 1994). Although similar arguments were presented in both cases, this Court's decision in Consolidation Coal differed from the Court of Appeals' decision in Trail Mountain in some significant respects. Most notably, in Consolidation Coal we held that with respect to coal leases on school trust lands, the interest and penalties assessed by the Board and the Division superseded the general prejudgment interest rate promulgated by statute. *Id.* at 527. In so ruling, we relied in part on the fact that "the State has an irrevocable [constitutional] duty to manage . . . trust lands for the sole benefit of the common schools and to receive 'full value' from any disposition of its school trust lands." *Id.* at 525. Consolidation Coal also implicitly rejected Trail Mountain's holding that interest payments did not begin to accrue until the Division demanded payment on the back royalties. *Id.* at 524.

Before this Court, the Division argues that the Court of Appeals erred in applying the six percent statutory prejudgment interest rate to all of the back royalties. The Division asserts that collection of the higher interest and penalty rates assessed by the Board and the Division for certain periods of Trail Mountain's delinquent obligations is necessary to fulfill the Division's constitutional obligation to obtain "full value" from any disposition of school

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ing payment of the federal rate. The Division has not challenged this ruling in its petition.

trust lands. The Division also argues that interest on each payment accrued from the date each payment became due, not at the time the Division first made a demand for payment.

Trail Mountain counters by asserting that notwithstanding Consolidation Coal's ruling on the matter, application of the Division's interest and penalty rates violates the Contract Clauses of both the Utah and United States Constitutions and that owing to the "ambiguity" of the alternative rate provision, interest should be assessed only from the date payment was first demanded by the Division. Trail Mountain also argues that a six-year statute of limitations, rather than the seven-year limitation employed by the Court of Appeals, applies to this dispute.

II. ANALYSIS

A. Contract Clause

We first address Trail Mountain's contention that regulations upheld by Consolidation Coal violate the Contract Clauses of both the Utah and United States Constitutions. In Consolidation Coal, we held:

> The specific constitutional requirement that the State obtain full value for its school trust lands, in conjunction with the legislature's broad grant of authority to the Board and our case law indicating that the Board has such further implied powers as are reasonably necessary to carry out its constitutional duties, mandates the conclusion that the Board is empowered to set interest rates and penalties regarding school trust lands.

886 P.2d at 527. Hence, although we acknowledged the mandate imposed by the Utah Constitution to obtain full value for disposition of school trust lands, we did not specifically address the issue of whether the imposition of prejudgment interest rates promulgated subsequent to the issuance of a coal lease on school trust lands violates

the Contract Clause of either the state or the federal constitution.

We did, however, address a question that is a fundadamental predicate to any Contract Clause analysis—whether the rules and regulations promulgated by the Board impaired or changed the terms of the Lease. Consol asserted as one of its claims on appeal that the rules and regulations abrogated the terms of the Lease. *Id.* at 527-28. We rejected that contention by noting that Consol's argument failed "to recognize that the Lease is expressly subject to the laws of Utah." [8] *Id.* at 528. Trail Mountain's Lease contained the same provision, which also expressly stated that the Lease was subject to the rules and regulations promulgated by the Board. Hence, when the Division sought to enforce the interest and penalty measures promulgated by the Board, it was merely acting pursuant to a right it held under the contract, and no contractual term of the Lease was impaired.

This Court also noted in Consolidation Coal that there is a critical difference "between interest provided for by contract and interest provided as damages." 886 P.2d at 528 n.23. In other words, if a law changes or abrogates interest payments explicitly provided by the contract, such a law would impair the contractual rights of the parties;

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[8] Obviously, there are natural limits to such provisions. The State cannot simply opt out of Contract Clause scrutiny by including such language in all of their contractual agreements and then subsequently rely upon a legislative edict that otherwise clearly violates the Contract Clause. However, in this case we are not dealing with an unanticipated legislative action which abrogates the validity or enforcement of a provision of the contract at issue. Rather, Trail Mountain's Lease specifically provided for regulation by specific agencies, and the regulations that were actually imposed merely prescribed the method of calculating compensation for violation of the terms of the Lease. Hence, the nature and source of the interest and penalty provisions were reasonably foreseeable, and their imposition did not alter any of the essential elements of the contract.

whereas, if a law merely changes the amount of interest provided by law as a remedy for breach of the contract, the underlying contract is not necessarily impaired. Cf. *Morley v. Lake Shore & Mich. S. Ry.*, 146 U.S. 162, 168-71, 36 L. Ed. 925, 13 S. Ct. 54 (1892) (holding that interest assessed pursuant to judgment on breach of contract action was not itself contractually vested right immune to alteration by legislative action). Trail Mountain, relying on *General Motors Corp. v. Romein*, 503 U.S. 181, 117 L. Ed. 2d 328, 112 S. Ct. 1105 (1992), assails this remedies/rights distinction, essentially arguing that the six percent prejudgment rate prescribed by § 15-1-1 in 1965 was, for the purposes of Contract Clause analysis, effectively incorporated into the Lease.[9] Trail Mountain correctly notes that Romein observed that not all laws affecting contractual remedies (as opposed to those directly impairing contractual rights) will survive Contract Clause scrutiny. 503 U.S. at 189. However, careful examination of Romein reveals a much more limited holding than that asserted by Trail Mountain. Specifically, the Romein Court stated, "For the most part, state laws are implied into private contracts regardless of the assent of the parties only when those laws affect the validity, construction, and enforcement of contracts." *Id.* at 189. Trail Mountain thus incorrectly interprets the scope of Romein's holding. The Contract Clause does not

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[9] Trail Mountain cites a number of Utah cases as support for its argument that "entitlement to prejudgment interest at the 'legal rate' is a term of every contract executed in the State of Utah." See *SCM Land Co. v. Watkins & Faber*, 732 P.2d 105, 108-09 (Utah 1986); *L & A Drywall, Inc. v. Whitmore Constr. Co.*, 608 P.2d 626, 629-30 (Utah 1980); *Mont Trucking, Inc. v. Entrada Indus., Inc.*, 802 P.2d 779, 782 (Utah Ct. App. 1990); *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 731-32 (Utah Ct. App. 1990); *Davies v. Olson*, 746 P.2d 264, 270 (Utah Ct. App. 1987); *Vasels v. LoGuidice*, 740 P.2d 1375, 1378 (Utah Ct. App. 1987). None of these cases support Trail Mountain's assertion. Rather, they simply reaffirm that prejudgment interest is a purely statutory remedy arising out of a contractual breach.

"protect against all changes in legislation, regardless of the effect of those changes on bargained-for agreements." *Id.* at 190.

In this case, the regulations which altered the rate of prejudgment interest over time did not affect the "validity, construction, [or] enforcement" of the contract between Trail Mountain and the Division. Rather, the regulations simply affected the calculation of the remedy granted for a breach of the terms of the lease. As a matter of public policy, an award of prejudgment interest simply serves to compensate a party for the depreciating value of the amount owed over time and, as a corollary, deters parties from intentionally withholding an amount that is liquidated and owing. Laws dictating the particular rate of prejudgment interest on delinquent sums are not vested contractual rights. Adjustments in the interest rate, so long as they are not unreasonably punitive, do not "convert an agreement enforceable at law into a mere promise"; nor do they "impair the obligation of pre-existing contracts." So long as the remedy of prejudgment interest is made available in a reasonable form and under appropriate circumstances, parties to a contract are not entitled to assume that one particular rate will predominate or that one particular legal provision governing its assessment will triumph over another. Trail Mountain's Contract Clause argument must fail.[10] Therefore, in light of our holding in Consolidation Coal, we reverse the Court of Appeals' ruling upholding the trial court's assessment of six percent prejudgment interest for the entire balance of Trail Mountain's overdue payments and remand with instructions to assess the properly promulgated Board rates of prejudgment interest and penalties for the period during which they were applicable.

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[10] In framing its argument, Trail Mountain alleged violations of both the federal, art. I, § 10, and state, art. I, § 18, constitutions. Because analysis under either provision necessarily begins with the same threshold question of whether a contract was in fact impaired, it is unnecessary in this case to address them separately.

B. Demand for Payment

The Division also contests the Court of Appeals' holding that prejudgment interest did not begin to accrue until the Division made its first demand for payment of the overdue royalties on October 15, 1985. The general rule is that "where the damage is complete and the amount of loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time." *Bjork v. April Industries, Inc.*, 560 P.2d 315, 317 (Utah 1977). In Consolidation Coal, we followed Bjork, holding that prejudgment interest on Consol's overdue royalties accrued from the date the payments were due. 886 P.2d at 523-24. The Court of Appeals, however, assumed that *Staker v. Huntington Cleveland Irrigation Co.*, 664 P.2d 1188, 1191 (Utah 1983), controlled. In Staker, the defendant irrigation company contracted with the plaintiff to provide a particular quantity of water. The plaintiff paid for the contracted amount but received a lesser quantity of water. This Court held, without further elaboration, that prejudgment interest on the overpaid amounts began only at the time the plaintiff demanded return of the surplus payments. *Id.* at 1191. Because the holding in Consolidation Coal specifically addresses the situation in this case and because Staker presented a relatively unique fact situation involving a refund of overpaid amounts, we hold that Consolidation Coal controls rather than Staker, and we reverse the Court of Appeals' ruling on that issue.

C. Statute of Limitations

In its cross-petition, Trail Mountain contests the Court of Appeals' ruling that the Division's recovery was limited by the seven-year statute of limitations provided by Utah Code Ann. § 78-12-2.[11] That provision reads as follows:

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[11] The Division did not contest application of the statute in its petition for certiorari and likewise failed to do so in its opening

> The State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the state to the same, unless: (1) such right or title shall have accrued within seven years before any action or other proceeding for the same shall be commenced; or (2) the state or those from whom it claims shall have received the rents and profits of such real property, or some part thereof, within seven years.

Trail Mountain argues that the Court of Appeals should have instead applied the six-year limitation provided by Utah Code Ann. § 78-12-23(2) for "an action upon any contract, obligation, or liability founded upon an instrument in writing." Specifically, Trail Mountain asserts that the language "by reason of the right or title of the state to the same" in § 78-12-2 limits the applicability of the statute to cases where the state sues for the right or title to the real property itself—i.e., adverse possession suits.

We disagree. A plain reading of the statute reveals that it applies to actions brought by the state as a consequence of the state's claim of right to real property or issues or profits derived from real property. If, as Trail Mountain claims, the statute were limited to adverse possession claims, the language "or the issues or profits thereof" would be rendered superfluous. "This court will not construe a statute in such a way as to render certain viable parts meaningless and void." *Nelson v. Salt Lake County*,

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brief. Only in its reply brief does the Division now argue that application of any statute of limitations is improper. The Division's argument on this matter again relies primarily on the state constitutional mandate to obtain full value for school trust lands. Nevertheless, regardless of the nature of the question, constitutional or otherwise, this Court is entitled to a full and proper presentation of the issues presented for review. We do not address the validity of the Division's argument because the Division has waived it.

905 P.2d 872, 876 (Utah 1995). In this case, the Division is alleging that Trail Mountain withheld issues or profits derived from leased school trust lands, and the Division, as a state agency, brought suit by virtue of its right to receive those profits. This lawsuit therefore fits within the express terms of § 78-12-2, and consequently, we uphold the ruling of the Court of Appeals as to its applicability.

The ruling of the Court of Appeals is affirmed in part and reversed in part, and we remand for further proceedings consistent with this opinion.

Chief Justice Zimmerman, Justice Howe, Justice Durham, and Justice Russon concur in Associate Chief Justice Stewart's opinion.

APPENDIX B

COURT OF APPEALS OF UTAH

No. 930226-CA

TRAIL MOUNTAIN COAL COMPANY,
Plaintiff, Appellant,
and Cross-Appellee,

v.

THE UTAH DIVISION OF STATE LANDS AND FORESTRY; RALPH MILES, DIRECTOR OF THE DIVISION OF STATE LANDS AND FORESTRY; THE UTAH DEPARTMENT OF NATURAL RESOURCES; AND DEE HANSEN, EXECUTIVE DIRECTOR OF THE UTAH DEPARTMENT OF NATURAL RESOURCES,
Defendants, Appellees,
and Cross-Appellant.

Oct. 27, 1994

Before BENCH and BILLINGS, JJ., and ORME, Associate P.J.

ORME, Associate Presiding Judge:

Plaintiff Trail Mountain Coal Company appeals the trial court's decision requiring Trail Mountain to pay additional royalties arising from its coal mining lease with the State. We affirm the trial court's decision in part, reverse in part, and remand for a reevaluation of the amount due.

FACTS

Trail Mountain Coal Company operates an underground coal mine located west of Orangeville, Utah. Part of the mine is on Utah school trust land,[1] from which Trail Mountain has extracted coal pursuant to a State lease agreement. The State lease was initially issued to Malcolm N. McKinnon in 1965, who assigned the lease, with the approval of the Director of the State Land Board (the Director), to Myron F. Fetterolf on July 11, 1979. On August 13, 1979, Fetterolf orally assigned the lease to Trail Mountain, at which time he also notified the Director that Trail Mountain would be operating the mine. In a document executed by Fetterolf's estate, the assignment was later reduced to writing. Trail Mountain mined coal from the leased property from 1979 through 1985, submitting all required quarterly Coal Production & Settlement Transmittal forms to the Division of State Lands and Forestry, then known as the Division of State Lands (the Division), and enclosing the state royalty payment it calculated in accordance with the instructions set forth in the forms.

The State lease required the payment of a royalty on all coal mined from the school trust land. According to the language of the lease, the lessee agreed

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[1] School trust land is land granted to the State of Utah by the federal government for the support of public schools. These lands were managed by the Utah Division of State Lands and Forestry. *See* Utah Code Ann. § 65A-1-4 (1993). At the time of the audit, the Division had the authority to manage the lease affecting the Trail Mountain mine. The Division of State Lands and Forestry no longer has the authority to manage the State's mineral estates on school trust lands. *See* Utah Code Ann. § 65A-1-4 (Supp.1994). Now the Director of School and Institutional Trust Lands has management control over mineral leases on school trust lands. *See* Utah Code Ann. §§ 53C-2-401 to -414 (Supp.1994). However, the Director's authority does not "limit or invalidate audits conducted by the Division of State Lands and Forestry prior to the effective date of this act." *Id.* § 53C-2-103(2).

> [t]o pay to Lessor quarterly, on or before the 15th day of the month succeeding each quarter, royalty
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> (a) at the rate of 15¢ per ton of 2000 lbs. of coal produced from the leased premises and sold or otherwise disposed of, or
>
> (b) at the rate prevailing at the beginning of the quarter for which payment is being made, for federal lessees of land of similar character under coal leases issued by the United States at that time,
>
> whichever is higher. . . .

Beginning with its first production from the state-leased portion of the mine, apparently in 1979, Trail Mountain paid the Division a fifteen cents per ton royalty, under subsection (a), for the coal it extracted. When the lease was originally issued in 1965, the royalty rate set by the federal government on its coal leases was also fifteen cents per ton. However, in August of 1976, the federal government changed the generally applicable royalty rate on underground coal leases from fifteen cents a ton to eight percent of the value of the coal produced.[2] All federal

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[2] On August 4, 1976, the United States Congress passed the Federal Coal Leasing Amendments Act of 1975, which was codified at 30 U.S.C. §§ 201-209 (1986). The Act's provisions relating to royalties payable under federal coal leases provide that

> [a] lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ percentum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations.

Plateau Mining Co. v. Division of State Lands & Forestry, 802 P.2d 720, 726 (Utah 1990) (quoting 30 U.S.C. § 207(a) (1988)). Federal regulations promulgated under the Act provide that

> [a] lease shall require payment of a royalty of not less than 8 percent of the value of coal removed from an underground mine, except that the authorized officer may determine a lesser amount, but in no case less than 5 percent if conditions warrant.

Id. (quoting 43 C.F.R. § 3473.3-2 (1989)).

underground mining leases thereafter issued or readjusted in Utah, with minor exceptions, contained the new eight percent royalty provision.

Continuously from 1979, the Division received Trail Mountain's subsection (a) royalty payments without question or protest. Division employees also informed Trail Mountain at various times that the royalty rate was still fifteen cents per ton. However, in 1985 the Division conducted an audit of the royalties received on its various coal leases. As a result of the audit, the Division concluded that Trail Mountain had underpaid its royalties from 1979 through 1984. According to the audit, Trail Mountain should have been paying royalties under subsection (b) of the lease agreement rather than subsection (a), because the prevailing federal rate of eight percent for newly issued leases was higher than the fifteen cents per ton rate.

The Division informed Trail Mountain of the audit results by letter dated October 15, 1985, and also provided it with a copy of the Royalty Audit Report. The report concluded that Trail Mountain had underpaid the required royalties by $3,351,474.75. The report also calculated $1,854,115.69 in interest due on the unpaid amount and assesed a late penalty of $16,606.76. The report based the interest amount on the statutory rate of six percent for the period from November 1, 1979, to June 30, 1981; upon the revised statutory rate of ten percent for the period from July 1, 1981, to November 30, 1982; and upon a regulation adopted by the Board of State Lands in November of 1982, purportedly imposing an eighteen percent rate, for the period from December 1, 1982, to October 15, 1985. The Division assessed the penalty based on a rule it promulgated in December of 1983. As a result of the audit report, the Division requested payment from Trail Mountain of unpaid royalties, interest, and penalties in the total amount of $5,222,197.20.

Trail Mountain disputed the auditor's interpretation of the lease and sought a redetermination of the royalty amount due under the agreement. After exhausting its administrative remedies, Trail Mountain filed the present action to enjoin collection of the claimed royalty amounts. The trial court initially granted Trail Mountain summary judgment, but the Utah Supreme Court reversed that decision and remanded the case. *See Plateau Mining Co. v. Division of State Lands & Forestry*, 802 P.2d 720, 732 (Utah 1990). Following a three-day bench trial, the trial court entered judgment for the Division, ruling that Trail Mountain owed the sum of $3,631,615.53 in delinquent royalty payments together with prejudgment interest at the rate of 6% per annum on each delinquent payment, amounting to $2,070,955.93, for a total judgment of $5,702,571.46.

Trail Mountain appeals the trial court's judgment on various grounds. Its principal claim is that the court erred in interpreting the lease as requiring Trail Mountain to pay an eight percent royalty on the coal mined during the audit period. In the alternative, Trail Mountain argues that even if the lease can be construed to require payment of the higher royalty rate, the trial court erred in ruling that certain royalty claims were not barred by the Statute of Limitations and in failing to allow Trail Mountain to deduct its transportation costs. Finally, Trail Mountain disputes the award and amount of prejudgment interest.[3] The Division cross-appeals, asserting that the trial court should have awarded a higher rate of interest and additional late fees.

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[3] Trail Mountain also claims that the trial court erred in ruling that the transfer of the State coal lease was an assignment, rather than a sublease, and that therefore Trail Mountain is primarily liable for payment of the royalty deficiency. We have considered Trail Mountain's claim, find it to be without merit, and decline to address it. *See State v. Carter*, 776 P.2d 886, 888-89 (Utah 1989); *State v. Vigil*, 840 P.2d 788, 795 (Utah App. 1992), *cert. denied*, 857 P.2d 948 (Utah 1993).

ROYALTY PROVISION OF THE LEASE

Trail Mountain argues that the trial court erred in its interpretation of the lease agreement. A trial court's interpretation of an unambiguous contract constitutes a question of law, which we review for correctness. *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1313 (Utah App. 1991); *Wilburn v. Interstate Elec.*, 748 P.2d 582, 585 (Utah App. 1988), *cert, dismissed,* 774 P.2d 1149 (Utah 1989). However, "[i]f the contract is ambiguous, i.e., susceptible to varying interpretation, extrinsic evidence may be introduced to clarify the parties' contractual intent." *Majestic,* 818 P.2d at 1313. *See Barnes v. Wood,* 750 P.2d 1226, 1229 (Utah App. 1988). In such cases, "[w]e review the trial court's construction based on extrinsic evidence under the more deferential clearly-erroneous standard." *Majestic,* 818 P.2d at 1313. *Accord Wade v. Stangl,* 869 P.2d 9, 12 (Utah App. 1994).

The trial court ruled that the lease required Trail Mountain to pay quarterly royalties at the same rate as then prevailed for newly-issued federal leases. In contrast, Trail Mountain argues that we should interpret the lease to require payment at the prevailing rate for federal leases actually in production, as it claims was the parties' intent. Under such an interpretation, Trail Mountain would only be obligated to pay fifteen cents per ton, up until the point at which the prevailing rate for federal leases in production was eight percent.

Trail Mountain's argument fails. The Utah Supreme Court already addressed the issue of which rate applies in Trail Mountain's previous appeal. *See Plateau Mining Co. v. Division of State Lands & Forestry,* 802 P.2d 720 (1990). In *Plateau Mining,* the trial court granted summary judgment for Trail Mountain, ruling that the lease was ambiguous, and therefore unenforceable, because it did not contain the alternative federal rate within the royalty provision. *Id.* at 725-26. In reversing the trial

court, the Supreme Court specifically considered the meaning of the royalty provision and concluded that the language of the lease was unambiguous, insofar as it clearly established how the federal rate was to be determined.[4] *See id.*

Regarding the parties' intent, the Supreme Court decided that "[t]he intent of the parties was that the higher of the [state and federal] rates should be paid to the State." *Id.* at 726. In determining what that rate was, the Court stated that "[t]he alternative rate provision, based on the prevailing federal rate clause, provides a practical method by which the appropriate royalty can be determined." *Id.* As quoted by the Court, federal regulations in effect at the time required a royalty payment on underground coal leases " 'of not less than 8 percent of the value of the coal removed.' " *Id.* (quoting 43 C.F.R. § 3473.3-2(a)(3) (1989)). Moreover, the Supreme Court concluded Trail Mountain "had the duty to determine whether the prevailing federal rate was higher and, if so, to pay at that rate." *Id.* at 728.

Thus, we believe the Supreme Court has already decided the issues of contract ambiguity, the parties' intent regarding the alternative payment schedule, and the establishment of the federal royalty rate. However, to the

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[4] Trail Mountain relies heavily on subsequent references in *Plateau Mining* to ambiguity and the need for extrinsic evidence. *See Plateau Mining Co. v. Division of State Lands & Forestry*, 802 P.2d 720, 726-27 (Utah 1990). We believe the apparent inconsistency in the opinion—which refers to the lease as being both clear and ambiguous—can be readily explained. In essence, the Court held that subsection (b) clearly and unambiguously defined an alternative royalty rate, namely the dominant royalty rate for federal leases, issued at the start of the relevant calendar quarter, levied on underground mining operations. While the provision itself is clear, resort to extrinsic evidence is nonetheless necessary to show what the going federal royalty rate would be at any particular time and how such a rate translates into an amount greater than fifteen cents per ton, the royalty rate under subsection (a).

extent the Supreme Court's decision left unresolved the proper interpretation of the lease language, Trail Mountains' argued-for interpretation is contrary to its plain meaning. The royalty provision provides, with our emphasis, that payment shall be made "at the rate prevailing, at the beginning of the quarter for which payment is being made, for federal lessees of land of similar character under coal leases *issued by the United States at that time*." As the Utah Supreme Court observed, "[t]he language of the lease provision is clear." *Plateau Mining*, 802 P.2d at 726. The lease clearly states the royalty rate shall be the prevailing rate in federal leases for similar lands issued at that time, i.e., as of the beginning of the quarterly royalty period, not of federal leases then in production, most of which, being older, still reflected the fifteen cents per ton rate. Thus, the trial court properly interpreted the lease to require payment at the prevailing rate of currently-issued federal leases, not the prevailing rate of leases then in production.

In sum, Trail Mountain's claim that it was only obligated to pay fifteen cents per ton during the audit period cannot stand. There is no dispute that the prevailing rate for federal leases *issued* during all calendar quarters in the audit period was eight percent. All federal leases for underground mining operations issued or readjusted in Utah during the audit period, with minor exceptions, required a royalty payment of eight percent of the value of the coal. Accordingly, the plain language of the lease and the Supreme Court's previous interpretation require the conclusion that Trail Mountain was obligated to pay the higher rate of eight percent. We therefore affirm the trial court's order in this respect.

TRANSPORTATION ALLOWANCE

Trail Mountain also claims the trial court erred in not allowing it to deduct its transportation costs before determining the required royalty payment. Under the current federal royalty scheme, in which lessees are required

to pay eight percent of the *value* of the coal, the lessees are first entitled to deduct transportation costs from the sale price before determining the coal's value. *See* 30 C.F.R. §§ 206.250, .257(a), .261(a) (1993). This is because the sale price does not equate to the coal's value, but rather reflects the value of the coal plus the cost of transporting it to the place of sale. *See id.*

The same should of course be true of the Utah royalty scheme when a State lessee, such as Trail Mountain, is obligated to pay the federal rate. In other words, the State lease incorporates the federal rate structure as a whole, not some selective variation thereof. Indeed, the Division's Production and Settlement Transmittal form, by which the State lessee is required to report the coal production and corresponding royalty amount, expressly provides, in the case of percentage royalties, for the deduction of "[a]ctual haulage costs to point of sale" before the net sale amount is multiplied by the applicable royalty percentage rate. Thus, it would appear that Trail Mountain was entitled to deduct its transportation costs from the sale price of its coal before applying the eight percent royalty rate.

However, the trial court ruled that Trail Mountain was not entitled to the transportation allowance because it neither applied for it, nor submitted its costs, when providing its coal production and royalty figures to the Division. However, since Trail Mountain calculated its royalty payment under the subsection (a) fifteen cents per ton method, it provided only the tonnage amount, which when multiplied by the rate, gave the required royalty. There was no reason for Trail Mountain to provide its transportation costs or even the sales price of the coal under that calculation method. Transportation costs are only considered when assessing royalties based on a percentage rate of the coal's value.

Only after the Division had completed the audit did the Division inform Trail Mountain that it would be subject to

the subsection (b) eight percent royalty method, and this after years of tacitly and, sometimes, explicitly approving Trail Mountain's payment on the tonnage-based method. As a result, Trail Mountain had no reason or opportunity to submit its transportation costs for deduction prior to that point. Nor did the Division request those costs prior to the audit. Likewise, the royalty as determined by the audit did not reflect, by estimate or otherwise, a deduction for the significant cost of transportation.

We therefore conclude that the trial court erred in ruling that Trail Mountain was not legally entitled to a transportation allowance under the alternative eight percent royalty provision. While Trail Mountain may not have applied for such a deduction, the circumstances of the case effectively denied it any such opportunity. We accordingly remand for a determination of whether Trail Mountain incurred transportation costs that were included in the valuation of the coal used in the Division's royalty calculation under subsection (b). If so, the trial court should deduct the transportation costs in determining the royalty amount due, in accordance with the federal royalty calculation methods contemplated in the lease.

APPLICABLE STATUTE OF LIMITATIONS

Trail Mountain next claims the trial court erred in concluding that the statute of limitations has no application to the State when acting in its capacity as trustee of public school lands. Whether or not the State is exempt from a particular statute of limitations is a question of law, which we review for correctness. *See Gramlich v. Munsey,* 838 P.2d 1131, 1132 (Utah 1992). *See also Ward v. Richfield City,* 798 P.2d 757, 759 (Utah 1990) ("trial court's interpretation of a statute constitutes a question of law"). We agree the trial court erred, and remand for reconsideration of the period for which the Division may recover royalty payments.

It is true that states are generally exempt from the applicable statute of limitations when acting in their capacity as school land trustee. *See Van Wagoner v. Whitmore,* 199 P. 670, 675-76 (Utah 1921); *California State Lands Comm'n v. United States,* 512 F.Supp. 36, 41 (N.D.Cal.1981); *Laramie County Sch. Dist. v. Muir,* 808 P.2d 797, 800-01 (Wyo.1991). However, an exception to the general rule is triggered when the state itself, through its legislature, makes the statute of limitation applicable to the state. *See California State Lands Comm'n,* 512 F.Supp. at 41; *Laramie County Sch. Dist.,* 808 P.2d at 801. *See also State ex rel. Cartwright v. Tidmore,* 674 P.2d 14, 16 (Okla. 1983) (state immune from statute of limitations unless statute provides to the contrary).

The Utah Legislature has specifically included the State of Utah within the applicable statute of limitations. According to the Utah Code,

> [t]he state will not sue any person for or in respect to any real property, *or the issues or profits thereof,* by reason of the right or title of the state to the same, unless:
>
> > (1) Such right or title shall have accrued within seven years before any action or other proceeding for the same shall be commenced.

Utah Code Ann. § 78-12-2 (1992) (emphasis added).[5] As if this section did not sufficiently indicate the Legislature's intent to include the State within the statute of limitations, another section provides that "[t]he limitations in this article apply to actions brought in the name

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[5] Trail Mountain argues that the applicable statute of limitations is found in Utah Code § 78-12-23(2) (1992), which imposes a six-year statute of limitations on actions based "upon any contract, obligation, or liability founded upon an instrument in writing." However, § 78-12-23 does not so much as mention the State, and is otherwise inapplicable given the specific language in Utah Code Ann. § 78-12-2 (1992).

of or for the benefit of the state or other governmental entity, the same as to actions by private parties." Utah Code Ann. § 78-12-33 (1992).[6]

Given the statutory scheme, we can only conclude that the Legislature intended to subject the State to the applicable statute of limitations. Accordingly, the Division's claims for royalties outside the seven-year period are barred.[7]

PREJUDGMENT INTEREST

Finally, Trail Mountain appeals the trial court's award of prejudgment interest, claiming such an award was erroneous because the lease royalty provision was allegedly subject to different interpretations, and therefore the royalty amount was too uncertain to support an award of prejudgment interest. The trial court's award of prejudgment interest, and the amount thereof, "present[] a question of law which we review for correctness." *Andreason v. Aetna Casualty & Sur. Co.*, 848 P.2d 171, 177 (Utah App. 1993). As a result, " 'we need not accord any particular deference to the decisions below.' " *Id.* (quoting *Vali Convalescent & Care Insts. v. Division of Health Care Fin.*, 797 P.2d 438, 444 (Utah App.1990)).

The purpose behind awarding prejudgment interest is to fully compensate the damaged party. *Id.; Fell v. Union Pac. Ry. Co.*, 32 Utah 101, 107-08, 88 P. 1003, 1005-06 (1907). However, prejudgment interest should only be awarded "in situations where the damage is complete, the loss can be measured by facts and figures, and

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[6] An exception exists for actions brought by the State to recover damages in asbestos litigation. *See* Utah Code Ann. §§ 78-12-33, -33.5 (1992).

[7] It is unclear whether this correction of legal error makes any actual difference, i.e., whether any of the royalties in issue actually fall outside the seven-year period, properly calculated. We leave that question for resolution on remand.

the amount of loss is fixed as of a particular time." *Andreason*, 848 P.2d at 177. *See Bjork v. April Indus., Inc.*, 560 P.2d 315, 317 (Utah 1977), *cert. denied*, 431 U.S. 930, 97 S.Ct. 2634, 53 L.Ed.2d 245 (1977). Where such "certainty exists, courts should allow interest from the time when damages became fixed, rather than from the date of the judgment." *Andreason*, 848 P.2d at 177. *See Bjork*, 560 P.2d at 317.

This is clearly a case in which damages are calculable with mathematical precision, and prejudgment interest is properly awarded. Measuring the difference between what Trail Mountain paid in royalties under subsection (a) and what the lease required under subsection (b) is a simple matter of multiplying the coal's net value by eight percent and subtracting the amount which Trail Mountain had already paid. We therefore affirm the trial court's decision to award prejudgment interest.

However, we must still determine at what point the interest began to accrue. The trial court ruled that prejudgment interest began accruing when the royalty payments became due. We disagree. Prejudgment interest only begins to accrue after demand for payment has been made. *Staker v. Huntington Cleveland Irrigation Co.*, 664 P.2d 1188, 1191 (Utah 1983); *Marcus v. Fox*, 150 Ariz. 342, 723 P.2d 691, 694 (App.1985); *Holst v. Guynn*, 696 P.2d 632, 635-36 (Wyo. 1985). Trail Mountain was not on notice of the deficiency in payments—nor was any deficiency carried on the Division's books—until after the Division completed its audit. Only at that point did the Division demand payment of the allegedly underpaid royalty amounts. In fact, prior to the Division's audit, Division employees had informed Trail Mountain that it was current in its payments and correct in calculating the royalty amount under subsection (a) of the lease.

Accordingly, we hold that the trial court erred in assessing interest from the due dates of the various royalty payments. Rather, prejudgment interest began accruing

on the underpaid royalty amounts as of the date the Division demanded payment.

THE DIVISION'S CROSS-APPEAL

The Division cross-appeals the trial court's award, claiming the trial court erred in awarding interest at a rate of only six percent and in failing to assess late penalties against Trail Mountain. The Division claims that the trial court should have awarded interest at a higher rate and should have assessed late fees, all as established by administrative regulations.

The State lease did not contain any provision regarding interest or penalties on past due payments. However, Utah law does provide for a statutory rate of prejudgment interest on contractual obligations. According to the current prejudgment interest statute, Utah Code Ann. § 15-1-1(2) (1992), "unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum." However, the current ten percent interest rate does not apply "to any contract or obligations made before May 14, 1981." *Id.* § 15-1-1(3). *See SCM Land Co. v. Watkins & Faber*, 732 P.2d 105, 108-09 (Utah 1986). Rather, contracts entered into before that date are subject to the earlier statutory rate of six percent. *SCM Land Co.*, 732 P.2d at 109. Accordingly, the trial court ruled that six percent was the applicable rate because the lease agreement was entered into prior to May 14, 1981.

The Division argues that both the lease and Utah law authorize the State Land Board to set its own interest rate and penalty scheme. The Division first focuses our attention on Article I of the lease agreement, which reads as follows:

> This lease agreement is granted subject in all respects to and under the conditions of the laws of the State of Utah and existing rules and regulations

> and such operating rules and regulations as may be hereafter approved and adopted by the State Land Board.

Second, the Division points to Utah Code Ann. § 65-1-23 (1986), which states that

> [e]xcept as otherwise provided by law, the State Land Board shall by rules and regulations prescribe the form of application, the form of lease, the annual rental, the amount of royalty and the basis upon which the royalty shall be computed, and such other details as it may deem necessary in the interest of the state.[8]

The trial court ruled that the State Land Board had no authority to unilaterally change the applicable rate of interest and to impose penalties not mentioned in the lease. We agree. As previously noted, Utah law establishes the rate of prejudgment interest "[e]xcept when parties to a lawful contract agree on a specified rate." Utah Code Ann. § 15-1-1 (1992). Trail Mountain and the Division did not agree on a specified rate of prejudgment interest, nor to the imposition of penalties for the late payment of royalties.

The Division relies on general language in the lease which subjects Trail Mountain to "such operating rules and regulations as may be hereafter approved and adopted by the State Land Board." However, the monetary terms of the lease are simply not within the ambit of ever-changing "operating rules and regulations," which relate more to mining operations and methods than to core contract terms. Were we to rule otherwise, the State Land Board could simply change the material terms of a lease by subsequent unilateral fiat.

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[8] This provision, along with the rest of Title 65, was repealed effective July 1, 1988. The equivalent provision currently in effect is found in Utah Code Ann. § 65A-6-2 (1993 & Supp.1994).

Nor does the statutory grant of rulemaking authority to the State Land Board, found in Utah Code Ann. § 65-1-23 (1986), allow the Board to change the material terms of the lease by subsequent rule. While section 65-1-23 authorizes the Board, "[e]xcept as otherwise provided by law," to establish rules and regulations prescribing the form of application, the form of lease, the amount of royalties and so forth, it says nothing about permitting the Board to retroactively alter existing leases. Nor does the "other details" language contemplate something as significant as a deviation from the generally prevailing statutory interest scheme. As already noted, Utah Code Ann. § 15-1-1 (1992) establishes the statutory rate for prejudgment interest in cases where the parties have not contractually agreed upon a rate.

Accordingly, we conclude that neither the lease language contemplating changes in operating rules nor the grant of authority found in section 65-1-23 provide a basis for altering the monetary terms of the lease, either in terms of deviating from the statutory rate of prejudgment interest or in assessing late fees. Therefore, we deny the Division's cross-appeal seeking a higher interest rate and late fees and affirm the trial court's decision in that respect.

CONCLUSION

The trial court properly ruled that the State lease required Trail Mountain to pay the higher federal royalty rate. However, the trial court incorrectly concluded Trail Mountain was not legally entitled to a transportation deduction. On remand, the trial court must determine if Trail Mountain incurred transportation costs, and if so, deduct them from the sales price before assesssing the eight percent royalty amount.

The trial court also erred in ruling that the Division's claims were not subject to any statute of limitations. While we reject Trail Mountain's contention that the six-year statute applies, we do hold the Divison's royalty

claims are subject to the seven-year statute. The trial court properly awarded prejudgment interest at the applicable statutory rate of six percent, and correctly denied the assessment of late fees. However, the trial court improperly assessed prejudgment interest from the time the royalty payments first theoretically came due, rather than from when the Division, following an audit, first demanded payment based on the federal rate.

Accordingly, we remand for a redetermination of the amount due in accordance with this opinion.

BILLINGS, J., concurs.

BENCH, J., concurs in the result.

APPENDIX C

[Filed May 13, 1992]

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF EMERY COUNTY
STATE OF UTAH

Civil No. 4847

TRAIL MOUNTAIN COAL COMPANY,
Plaintiff,

vs.

THE UTAH DIVISION OF STATE LANDS AND FORESTRY, RALPH MILES, DIRECTOR OF THE DIVISION OF STATE LANDS AND FORESTRY, THE UTAH BOARD OF STATE LANDS AND FORESTRY, THE UTAH DEPARTMENT OF NATURAL RESOURCES, DEE HANSEN, EXECUTIVE DIRECTOR OF THE UTAH DEPARTMENT OF NATURAL RESOURCES,
Defendants.

ORDER AND JUDGMENT

The Court having entered its Findings of Fact and Conclusions of Law hereby:

ORDERS, ADJUDGES AND DECREES AS FOLLOWS:

1. Plaintiff's Complaint is dismissed with prejudice.

2. Defendants are awarded judgment against Plaintiff in the amount of THREE MILLION SIX HUNDRED THIRTY ONE THOUSAND SIX HUNDRED FIFTEEN DOLLARS AND FIFTY THREE CENTS ($3,631,615.53) for unpaid royalties and interest in the amount of TWO MILLION SEVENTY THOUSAND NINE HUNDRED

FIFTY FIVE DOLLARS AND FORTY SIX CENTS ($2,070,955.93) for a total judgment of FIVE MILLION SEVEN HUNDRED TWO THOUSAND FIVE HUNDRED SEVENTY ONE DOLLARS AND FORTY SIX CENTS ($5,702,571.46).

Dated this 12th day of May 1992.

BY THE COURT:

/s/ Boyd Bunnell
BOYD BUNNELL
District Judge

APPENDIX D

[Filed May 13, 1992]

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF EMERY COUNTY
STATE OF UTAH

Judge Boyd Bunnell

Civil No. 4847

TRAIL MOUNTAIN COAL COMPANY,
Plaintiff,

vs.

THE UTAH DIVISION OF STATE LANDS AND FORESTRY, RALPH MILES, DIRECTOR OF THE DIVISION OF STATE LANDS AND FORESTRY, THE UTAH BOARD OF STATE LANDS AND FORESTRY, THE UTAH DEPARTMENT OF NATURAL RESOURCES, DEE HANSEN, EXECUTIVE DIRECTOR OF THE UTAH DEPARTMENT OF NATURAL RESOURCES,
Defendants.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The above captioned matter came before the Court for trial on March 17, 18 and 19 1992. Plaintiff was represented by its attorneys, L.R. Curtis, Jr., and Richie D. Haddock. Defendants were represented by their attorneys, Gayle F. McKeachnie and Clark B. Allred. The parties prepared and submitted to the Court an amended Pre-Trial Order, which set forth undisputed facts. The Court received testimony and exhibits offered by each of the parties, and after hearing argument from counsel, took

the matter under advisement. This case has also been before the Supreme Court of the State of Utah which decided certain issues and gave direction to the trial court as to how the remaining issues should be considered and determined. The Court having fully considered the matter, entered its Memorandum Decision, hereby enters the following Findings of Fact:

FINDINGS OF FACT

1. The Utah State Land Board on behalf of the State of Utah and the Plaintiff are parties to a Utah State Coal Lease being Mineral Lease #22603.

2. Pursuant to the terms of that lease, Plaintiff was required and covenanted and agreed to pay royalty on the coal mined at the alternative rates as specified in Article III, Second, (a) or (b) of the lease, which states as follows:

> The Lessee, in consideration of the granting of the rights and privileges aforesaid, hereby covenants and agrees as follows:
>
> * * *
>
> SECOND: To pay to Lessor quarterly, on or before the 15th day of the month succeeding each quarter, royalty
>
> (a) at the rate of 15 cents per ton of 2000 lbs. of coal produced from the leased premises and sold or otherwise disposed of, or
>
> (b) at the rate prevailing, at the beginning of the quarter for which payment is being made, for federal lessees of land of similar character under coal leases issued by the United States at that time,
>
> whichever is higher . . . .

3. The real property which was subject to the State Coal Lease was granted to the State of Utah, under the Utah Enabling Act for the support of the common schools.

4. During the time period 1979 through 1985, the Plaintiff mined coal from the property and paid the State of Utah royalty at 15 cents per ton under provision (a) of the royalty clause in the State Coal Lease.

5. In 1985 the State of Utah audited the performance of Plaintiff under the lease including the royalty payments by the Plaintiff. Following the audit the State claimed that the Plaintiff should have paid a royalty rate of 8% as specified under part (b) of the royalty provision since that was the higher rate.

6. The Court had previously found that part (b) was ambiguous and subject to various interpretations. As noted by the Utah Supreme Court, that does not prevent enforcement of the royalty provision but rather requires the Court to receive extrinsic evidence to resolve the ambiguity and carry out the true intent of the parties.

7. The Utah Supreme Court had previously stated that,

> The language of the lease provision is clear. The intent of the parties was that the higher of the two rates should be paid the state.

8. That conclusion by the Utah Supreme Court was further established by the evidence received at trial to the effect that the intent of the drafters of the lease was to fix a royalty payment equal to, or the same as, that being paid to the federal government on coal leases on federal land.

9. When the lease at issue in this case, was signed and executed on February 8, 1965, the standard royalty rate set by the federal government on its coal leases was fifteen cents (.15) per ton, the same amount set forth in part (a) of the State Coal Lease royalty provision.

10. In August of 1976, the federal law changed. The Federal Coal Leasing Amendments Act was passed and regulations promulgated thereunder. At that time the federal government changed the amount to be paid on its

coal leases to eight percent (8%) of the value of the coal produced. Leases issued after this date contained this royalty except for a few exceptions, specifically authorized upon application.

11. To carry out the intent of the drafters of the State Coal Lease, the lessees under the State Coal Leases after the change in the Federal law would automatically be required to pay the royalty provided in provision (b), that being eight percent (8%) of the value of the coal production since that is higher than the fifteen cents per ton required under provision (a).

12. The Plaintiff, by reasonable inquiry, could have established the fact that the prevailing federal rate during the period of the audit was eight percent (8%) of the value of the coal produced.

13. Eight percent (8%) was the one and only royalty rate set by the federal government for underground mining during the time period in question with few exceptions.

14. The prevailing federal rate during the audit period was eight percent of the value of the coal produced by the Plaintiff from the State Coal Lease and was the rate that should have been paid by the Plaintiff.

15. All leases issued or readjusted by the federal government during the audit period, in the State of Utah, except four or five, set the royalty rate at eight percent (8%) of value.

16. The same federal royalty rate was being charged by the federal government during the audit period for coal leases in Utah on all land whether it was within the same mine, the same canyon, or the same area.

17. The only action taken by the Plaintiff to determine the correct royalty rate was to make inquiry of the employees of the Division of State Lands, who had no authority to alter or change the terms of the leases or establish what royalty should be paid or as to the meaning of any terms in the lease.

18. Plaintiff claimed that it was entitled to a haulage allowance. However, Plaintiff never made application for such an allowance and never provided to the state information regarding such a claim. The State auditors relied upon the production and sales revenue information furnished by the Plaintiff.

19. The amount of royalty owed for each quarter is capable of mathematical determination. The lease is silent as it relates to the payment of interest and penalties.

20. Based on the tonnage figures and sales prices set forth on Schedule V to the Pre-Trial Order, the Plaintiff owes to the Defendant the sum of $3,631,615.53 in delinquent royalty payments together with interest thereon at the rate of 6% per annum on each delinquent payment from the date each payment became due.

21. Defendants have submitted with these Findings the interest calculation at the rate determined by the Court which interest is $2,070,955.93 through April 1, 1992.

CONCLUSIONS OF LAW

The Court having made the preceding Findings of Fact hereby enters the following Conclusions of Law.

1. Plaintiff had the legal obligation to determine and pay the correct royalty rate owed on coal produced under the State Coal Lease.

2. The prevailing federal rate and therefor the rate the Plaintiff should have paid under part (b) of the royalty provision during the audit period was eight percent of the value of the coal produced.

3. Based on the fact that the rate fixed by the federal government was almost universally applied during the audit the questions regarding the terms "land of similar character" and whether the provision applied to lessees of leases issued prior to or at the beginning of the quarter are not significant in determining the prevailing federal rate.

4. The different interpretations placed on "land of similar character" portion of the royalty clause under these facts had no particular significance during the audit period.

5. The Plaintiff had the duty to determine the prevailing federal rate. There is no ambiguity in the application of part (b) of the royalty provision and Plaintiff, by making reasonable inquiry, could have determined the amount of royalty it should have paid under the alternative royalty provision.

6. The Plaintiff, under the terms of the lease, had the legal obligation to pay the higher rate commencing at the time the federal rate was increased to 8%.

7. Plaintiff had no right to rely on any representations made by employees of the State Division of Lands and Forestry as to what the rate should be or those employees interpretation as to what was meant by the wording in part (b) of the royalty clause. This is particularly true when considered with the fact that the leased land was school trust lands.

8. The Utah Supreme Court stated that "The Plaintiffs knew, or should have known, that the leased lands were trust lands and that they also knew that the lease required them to pay the prevailing federal rate when it was the higher rate."

9. Plaintiff in the exercise of reasonable prudence and diligence was required to do more than make inquiry of State employees who had no authority to alter or change the terms of the lease as to what royalties should be paid or as to the meaning of the terms of the lease.

10. Plaintiff is not entitled to a haulage allowance.

11. There was no evidence that the State, through the actions of anyone who had authority to do so, intentionally waived the right to require payment of the correct amount of royalty owed under the lease.

12. The Board of State Lands and Forestry is the only one that can make binding obligations on the State of Utah relative to the lease. There was no evidence that the Board made any indication that it was waiving the right to collect the highest rate provided for in the royalty provision.

13. The State did not waive its right to collect royalties at the eight percent of the value of production.

14. There is no evidence that an injustice is being done by requiring the Plaintiff to pay the correct amount of royalty that would invoke the exception to the legal principle that estoppel may not be asserted against the State of Utah. There is no injustice in requiring the Plaintiff to do what it was required to do under the lease and particularly is this true because of the State's obligation in administering trust lands.

15. The prevailing case law holds that the Statute of Limitations has no application as to school trust lands.

16. The amount of royalty that should have been reported and paid by the Plaintiff each quarter is capable of definitive determination. The State is entitled to collect interest on all delinquent amounts.

17. The Court is of the opinion that the state is entitled to the rate of interest authorized by law, which is six percent (6%) the legal rate in effect at the time the lease was executed.

18. The Board of the State Lands and Forestry had no right by regulation to change the monetary obligation undertaken by the lease. If such authority were allowed, the Board could set any arbitrary rate that it saw fit and rewrite the monetary obligation under the lease.

19. Plaintiff is obligated to pay the legal rate of interest on delinquent payments and the State by receiving that interest fulfills it obligation as trustee of school lands.

20. The Court has previously determined that the "Sub-lease" by which the Plaintiff obtained the right to mine under the state lease was an assignment. Plaintiff has filed a motion asking the Court to reconsider that ruling. The Court grants that motion and after taking into account the additional matters set forth in the Plaintiff's memorandum, is still of the opinion that the document, though entitled "Sub-lease", was in fact, an assignment since the Plaintiff received all rights under the lease and agreed to the performance of all duties.

21. The Court's prior decision on that issue, therefore, remains in full force and effect and the Court has signed a formal order to that effect.

22. Based on the tonnage figures and sales prices set forth on Schedule V to the Pre-Trial Order, the Court finds that the Plaintiff owes to the Defendant the sum of $3,631,615.53 in delinquent royalty payments together with interest thereon at the rate of 6% per annum on each delinquent payment from the date each payment became due.

DATED this 12th day of May, 1992.

BY THE COURT:

/s/ Boyd Bunnell
BOYD BUNNELL
District Judge

APPENDIX E

SUPREME COURT OF UTAH

No. 920321

CONSOLIDATION COAL COMPANY AND PITTSBURGH & MIDWAY COAL MINING COMPANY,
Plaintiffs, Appellants, and Cross-Appellees,

v.

UTAH DIVISION OF STATE LANDS AND FORESTRY; RALPH MILES, DIRECTOR OF DIVISION OF STATE LANDS AND FORESTRY; UTAH BOARD OF STATE LANDS AND FORESTRY; UTAH DEPARTMENT OF NATURAL RESOURCES; DEE HANSEN, EXECUTIVE DIRECTOR OF UTAH DEPARTMENT OF NATURAL RESOURCES,
Defendants, Appellees, and Cross-Appellants.

Dec. 2, 1994

ZIMMERMAN, Chief Justice:

Consolidation Coal Company and Pittsburgh & Midway Coal Mining Company (collectively "Consol") appeal, and the Utah Division of State Lands and Forestry, the Utah Board of State Lands and Forestry, the Utah Department of Natural Resources, and various individual defendants employed by the State of Utah (collectively the "State") cross-appeal, a decision of the Seventh Judicial District Court of Emery County. This case involves

the proper interpretation of the royalty provision in a coal lease entered into between the State and Consol and the amount of royalties and interest due under that provision. As discussed below, this case has previously been before this court and was remanded in *Plateau Mining Co. v. Utah Division of State Lands & Forestry*, 802 P.2d 720 (Utah 1990). On remand, the trial court held a two-day bench trial, after which it rejected Consol's arguments regarding the proper interpretation of the royalty provision and found that Consol had underpaid its royalties to the State by a substantial amount. The trial court further determined that Consol owed prejudgment interest on the unpaid royalties at an interest rate of 6%.

This time on appeal, Consol argues that the trial court erred (i) in rejecting the interpretation of the royalty provision purportedly established by the parties' course of conduct; (ii) in concluding that the interpretation of the royalty provision allegedly agreed to by the parties was a modification of the royalty provision; (iii) in failing to make necessary findings of fact; (iv) in finding that the State was not estopped from asserting a royalty higher than that which had been paid by Consol; and (v) in determining that prejudgment interest on the unpaid royalties was appropriate. Conversely, the State contends that the trial court erred in assessing a 6% interest rate on the unpaid royalties rather than the higher rates and penalties provided for under the Utah Board of State Lands and Forestry's rules and regulations. We reject all of Consol's claims of error but agree with the State that the trial court erred in assessing a 6% rate of interest. We remand for further proceedings on the interest rate matter.

Consol operates a coal mine in central Utah that includes State Coal Lease ML-25005 (the "Lease"). The land that is subject to the Lease was granted to the State for the support of the common schools by the United States Congress under the Utah Enabling Act. Utah En-

abling Act ch. 138, §§ 6, 10, 28 Stat. 107 (1894). At all times relevant to this case, the school trust lands were managed by the Utah Division of State Lands and Forestry (the "Division") under policies, rules, and regulations established by the Utah Board of State Lands and Forestry (the "Board"). Utah Code Ann. §§ 65A-1-2, -1-4, -4-3, -7-1 (1993) (amended 1994).[1]

The State originally issued the Lease to Kemmerer Coal Company ("Kemmerer") in January 1968 for a twenty-year term. The State used a standard lease form in its transaction with Kemmerer. That form authorizes the lessee or its assignees to extract coal in exchange for specified royalties. These royalties are fixed at the higher of 15¢ per ton or the "rate prevailing, at the beginning of the quarter for which payment is being made, for federal lessees of land of similar character under coal leases issued by the United States at that time."[2] The Lease

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[1] In 1994, the legislature made extensive revisions to the Code sections dealing with school and institutional trust lands. *See* Utah Code Ann. §§ 53C-1-101 to -5-104. The revisions, among other things, create a new, independent agency within state government entitled School and Institutional Trust Lands Administration (the "Administration"). Utah Code Ann. § 53C-1-201. The Administration is vested with control over all trust lands in the state and is managed pursuant to policies established by the newly created School and Institutional Trust Lands Board of Trustees. *Id.*

[2] In relevant part, the royalty provision reads:

> The Lessee, in consideration of the granting of the rights and privileges aforesaid, hereby covenants and agrees as follows:
>
> . . . .
>
> SECOND: To pay to Lessor quarterly, on or before the 15th day of the month succeeding each quarter, royalty
>
> (a) at the rate of 15¢ per ton of 2000 lbs. of coal produced from the leased premises and sold or otherwise disposed of, or
>
> (b) at the rate prevailing, at the beginning of the quarter for which payment is being made, for federal lessees of land of similar character under coal leases issued by the United States at that time, whichever is higher.

also indicates that it "is granted subject in all respects to and under the conditions of the laws of the State of Utah and existing rules and regulations and such operating rules and regulations as may be hereafter approved and adopted by the State Land Board."

Kemmerer never mined the Lease and eventually assigned it to Consolidation Coal Company ("Consolidation") and its co-plaintiff in this case, Pittsburgh & Midway Coal Mining Company ("Pittsburgh & Midway"). On June 22, 1977, Consol submitted to the Utah State Division of Oil, Gas and Mining a proposed mine plan. The proposed mine, known as the Deep Emery Mine, consisted of private lands as well as state and federal leases, including federal lease number U5287.[3] The royalty rate payable on this federal lease was 17.5¢ per coal ton. Consol began mining during the second quarter of 1981 and continued to mine through 1986. During this time, it paid the State royalties of 17.5¢ per coal ton, on the basis of its view that the rate on its federal lease in the same mine constituted the "rate prevailing . . . for federal lessees of land of similar character."

When the State issued the Lease in 1968, the federal government's royalty rate on its mining leases was generally 15¢ per ton.[4] In 1976, Congress enacted the Federal Coal Leasing Amendments Act ("FCLAA"). Pub. L. No. 94-377, 90 Stat. 1083 (1976). The FCLAA authorized the secretary of the interior to prescribe increased federal royalty rates on newly issued leases. 30 U.S.C. § 207 (1979). The new rates were fixed at 8% of the

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[3] Consol indicates that no state leases were mentioned in the 1977 plan. The Lease involved in the present dispute was, however, within the Deep Emery Mine, regardless of whether it was mentioned in the 1977 plan.

[4] Although the general federal cents-per-ton rate was 15¢, Consol's federal lease carried a rate of 17.5¢ per ton during the relevant time period. Consol argues that this 17.5¢-per-ton rate was the prevailing federal rate for lessees of land of similar character.

value of the coal produced from any underground mines. 43 C.F.R. § 3473.3-2(a)(3) (1979).

In December 1984, the State began an audit of state coal leases, including Consol's. The auditors discovered that in 1977, the royalty rates on newly issued federal coal leases had been increased to 8% but Consol and others had not reported or paid the higher rates on their, state leases.

In October of 1985, the Division notified Consol that it owed the State the difference between 17.5¢ per ton and 8% of the value of all coal mined from the Lease up to that time and that all future royalties would be 8% of value. After receiving notice of the higher rate, Consol continued to mine the Emery Mine and pay only 17.5¢ per ton.

Consol filed this action, seeking a declaratory judgment that the royalty rate due under the Lease was 17.5¢ per ton of coal. It based its claim on the terms of the Lease and on its assertion that the State had agreed to the 17.5¢ royalty rate. The State counterclaimed, asserting that the rate was 8% of the value of the coal, which the State contended represented the prevailing federal rate. The State also denied entering into any agreement to fix the royalty rate at 17.5¢ per ton. Finally, the State claimed late-payment penalties and interest on the amount alleged to be owing.

The trial court initially granted summary judgment in favor of Consol on the ground that the rate provision was facially ambiguous. It ruled similarly in three other declaratory judgment actions brought by other mining companies against the State, all involving the 8% royalty. The State appealed the dismissals to this court, which consolidated the cases. We reversed the grants of summary judgment and remanded the cases with instructions to

take further evidence on several issues, as discussed below. *Plateau Mining Co.*, 802 P.2d at 732.[6]

On the royalty question, we primarily addressed whether the trial court had erred in ruling that the alternative rate provision was ambiguous and therefore unenforceable. *Id.* at 725-28. We agreed with the trial court that the provision was somewhat ambiguous but disagreed that this made it unenforceable. *Id.* at 726. We concluded that any ambiguity in this case arose from the phrase "rate prevailing . . . for federal lessees of land of similar character." *Id.* In other words, the Lease provision was ambiguous only in the sense that the exact alternative rate was not clear on the face of the document, but this ambiguity did not make the Lease unenforceable. *Id.* Instead, we indicated that the fact finder should have resolved any ambiguity by reference to extrinsic evidence of the parties' intent. *Id.* We remanded the case to the trial court to determine how "the federal rate was to be calculated, what the rate was, and when it became 'prevailing,' if it did." *Id.*

Because the matter had been decided on summary judgment, the trial court had not determined whether Consol had reached an "agreement" with the State regarding the proper interpretation of the royalty provision. *Id.* at 727. This agreement allegedly set the royalty rate on Consol's Lease at 17.5¢ per ton, which corresponded with the rate Consol was paying on its federal lease in the same mine. *Id.* We remanded the case to the trial court to decide this issue on the merits. *Id.*

In short, two broad questions relating to the proper interpretation of the alternative rate provision were to be decided on remand. First, what was the prevailing rate, and when did it become prevailing? Second, did Consol and the State "agree" upon an interpretation of the royalty

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[6] The present case involves only Consolidation and Pittsburgh & Midway. The other coal companies are no longer involved in this suit.

provision, or is the State estopped from denying such an agreement, under which 17.5¢ would be the prevailing rate for federal lessees of land of similar character? As to the issue of interest on the unpaid royalties, the trial court was to determine whether prejudgment interest was appropriate and the rate at which it was to be computed. *Id.* at 732.

On remand, the trial court conducted a two-day bench trial. It found that (i) during the relevant period, "the same federal royalty rate was being charged by the federal government during the audit period for coal leases in Utah on all land whether it was within the same mine, the same canyon, or the same area"; (ii) the "rate prevailing for federal lessees of land of similar character" was 8% of value; (iii) the Division had no authority to modify the Lease, and in any case, the parties had not agreed to set the rate at 17.5¢ per ton; (iv) Consol had failed to prove that the State's actions estopped it from asserting a royalty rate higher than 17.5¢ per ton; and (v) the State was entitled to interest at a rate of 6% on the unpaid royalties.[6] Consol again appeals the judgment as a whole, and the State cross-appeals as to the interest rate issue.

We first state the proper standard of review. We previously remanded the case to the trial court to hear evidence on the prevailing-rate and "agreement" questions. Despite Consol's arguments to the contrary, the primary issue in this appeal is whether the trial court erred in resolving these factual questions. We review the trial court's findings of fact under the clearly erroneous standard. "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R.Civ.P. 52(a). The party challenging the

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[6] This is intended only as a brief synopsis of the trial court's decision. The court entered a lengthy memorandum opinion and separate findings of fact and conclusions of law.

trial court's factual findings has the heavy burden of establishing that those findings are not supported by substantial and competent evidence. *Cambelt Int'l Corp. v. Dalton*, 745 P.2d 1239, 1242 (Utah 1987). To meet this burden, "an appellant must first marshal all the evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support the findings even in viewing it in the light most favorable to the court below." *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899 (Utah 1989); *see also Cornish Town v. Koller*, 758 P.2d 919, 922 (Utah 1988); *Cambelt Int'l*, 745 P.2d at 1242.

We next address Consol's claims relating to the royalty rate fixed by the alternative rate provision of the Lease. Consol contends that the trial court erred in rejecting the interpretation of this provision allegedly agreed to by the parties and in determining that Division personnel did not have the authority to agree to a modification of the Lease. Consol argues that the trial court misunderstood its position. It denies arguing that the parties entered into an agreement to modify the Lease and admits that there was no such agreement. Rather, it claims that the parties reached an agreement as to the proper interpretation of the alternative rate provision. It claims that the "Division had the implied authority to make a reasonable interpretation of" Board statements regarding the meaning of the provision. According to Consol, the Division agreed that the alternative rate provision required Consol to pay the same rate it was paying on a federal lease in the same mine—17.5¢ per ton. Consol asserts on appeal that the trial court failed to address this interpretative-agreement argument and neglected to make findings of fact regarding it.

Consol correctly asserts that the trial court did not enter a finding specifically negating the existence of an interpretive agreement. Nevertheless, we disagree that the trial court failed to consider and improperly rejected Consol's interpretive-agreement argument. Our decision is based upon three factors: (i) the fair import of the trial court's

opinion is that it understood but rejected Consol's interpretitive-agreement argument; (ii) the trial court did specifically negate Consol's evidence in support of the argument; and (iii) Consol's interpretation appears facially incompatible with the language of the alternative rate provision.

First, the fair import of the trial court's opinion, when read in context and as a whole, is that it understood Consol's interpretive-agreement argument but declined to accept it. At trial, Consol argued in support of the alleged agreement, while the State argued against the existence of an agreement and argued instead that the prevailing rate was 8%. The court had to choose between these mutually exclusive versions of the facts. The court was not required to negate each specific element of Consol's version of the facts. *See Sorenson v. Beers*, 614 P.2d 159, 160 (Utah 1980). It simply found that the facts supported the State's position and that the parties did not agree to set the rate at 17.5¢ per ton, regardless of whether the alleged agreement is characterized as an agreement to modify or an agreement to interpret the contract.

Second, the trial court made specific findings of fact regarding the evidence that Consol presented in support of the alleged interpretive agreement. These findings are consistent with the State's position, namely, that the trial court understood Consol's argument but did not accept it. Consol relies heavily on minutes from Board meetings held in 1973 and 1975 as well as on discussions with Division officials which occurred prior to the opening of the mine. The trial court expressly declined to adopt Consol's interpretation of Board minutes. It found that a "clear reading of those minutes . . . shows that there was no discussion or conclusion reached by the Board as to the specific meaning of" any of the royalty terms in

the Lease.[7] We find no evidence suggesting that the court clearly erred in making this determination.

The trial court also addressed Consol's evidence relating to the discussions between Division officials and Consol. Consol is correct in stating that the trial court did not negate the fact that those discussions occurred. Consol incorrectly asserts, however, that the trial court failed to make findings of fact regarding them and therefore must have failed to consider them. In fact, the trial court did address the discussions. It found that during the discussions, Consol had failed to disclose relevant information to Division employees with whom it dealt. Specifically, the trial court expressly found that Consol had neglected to inform Division employees of the FCLAA and its change in federal rates. In addition, the trial court did not find that Consol had disclosed the fact that it had several federal leases in Utah and had unsuccessfully appealed the government's readjustment of those leases to an 8% royalty or the fact that Consol had been issued a new federal lease in 1983 that carried an 8% royalty. Under the Lease, Consol had the responsibility of calculating the royalty and submitting the required royalty infor-

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[7] Moreover, we do not see how minutes from Board meetings held in 1973 and 1975 would be particularly persuasive, even if those minutes read exactly as Consol claims they do. Congress did not pass the FCLAA until 1976. The FCLAA and implementing regulations changed the federal rates and redefined the classification of federal leases. After the passage of the FCLAA, the primary, and arguably only, "characteristic" relevant for purposes of federal royalty rates is whether the mine is surface or underground. *See* 30 U.S.C. § 207(a); 43 C.F.R. § 3473.3-2(a)(3). The federal government had only one minimum rate for readjusted or newly issued leases in underground mines—8%. The trial court found that this rate was the same regardless of whether the leases were in the same area, canyon, or mine. As a result, Board minutes from the pre-FCLAA era that purport to define what constitutes "land of similar character" are not particularly useful in the present regulatory milieu, in which there are generally only two federal rates and the dispositive "characteristic" is the nature of the mine.

mation. In *Plateau Mining Co.*, we noted: "The plaintiffs were responsible for calculating the alternative federal prevailing royalty payments. . . . The State had a right to rely on the good faith of its lessees in calculating the royalty and submitting the required information." 802 P.2d at 727. The FCLAA and its change in federal rates should have raised a serious question as to the proper royalty rate, and thus, Consol should have disclosed the FCLAA to the State's agents.

In sum, the trial court did not fail to consider the discussions, nor did it consider them relevant only to an agreement to modify the contract. Rather, we conclude from the trial court's findings and conclusions that it declined to find any binding agreement, because doing so would permit Consol to take adavntage of its failure to disclose to the State facts that would have raised serious questions as to Consol's position. *See* 3 *Corbin on Contracts* § 558 (1960). We find no error here.

Finally, Consol's interpretation, which it claims the State agreed to, is particularly difficult to accept, given its significant divergence from the language of the provision. The provision required payment of the "rate prevailing, *at the beginning of the quarter for which payment is being made*, for *federal lessees* of land of similar character." Consol's interpretation, which the Division allegedly agreed to, subtly alters this critical phrase in two ways. First, Consol's interpretation requires it to look only at the rate it paid for *its lease* in the same mine. Instead of focusing on the rates paid by all federal *lessees*, Consol primarily highlights the one and only lease it held in that mine, which had a rate of 17.5¢ per ton.

Consol's interpretation also "reads out" the portion of the alternative rate provision that requires Consol to determine and submit the prevailing rate on a quarterly basis. Consol relies on an agreement allegedly arising from discussions between the State and Consol during 1978 and 1981 and Board meetings held before 1976.

This purported agreement binds the State to the 17.5¢ royalty rate until readjustment.[8] Under Consol's interpretation, as long as it held a federal lease at 17.5¢ per ton, its state leases would bear the same rate, regardless of subsequent changes in the federal rate structure, the rates paid by other lessees, or the number of other federal lessees holding leases with that rate. The Lease, however, provided for a fluctuating rate to be redetermined quarterly. The obvious purpose of this provision is to prevent the royalty lock-in that Consol now asserts.

In conclusion, the trial court was vested with the responsibility of resolving factual conflicts. The amount of the prevailing federal rate and the existence *vel non* of an agreement to interpret the Lease are factual questions solidly within the discretion of the trial court. The trial court accepted the State's verision of the case and rejected Consol's. We cannot conclude that the evidence on these issues "so clearly preponderates in favor of the appellant that reasonable people would not differ on the outcome." *E.A. Strout W. Realty Agency, Inc. v. W.C. Foy & Sons, Inc.*, 665 P.2d 1320, 1322 (Utah 1983). We affirm the trial court's determination as to the prevailing federal royalty rate.

Consol next contends that the trial court failed to make necessary findings of fact. Nevertheless, other than attacking the trial court's decision not to adopt its interpretation of the Lease, Consol does not specify the missing findings. We reiterate that "[a] trial court need not resolve every conflicting evidentiary issue, '[n]or is the court required to negate allegations in its findings of fact.'"

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[8] Much of the trial court's discussion regarding modifications to the Lease is in the context of the provision's quarterly reassessment requirement. The trial court correctly notes that Consol's interpretation is inconsistent with the requirement that Consol determine and submit the royalties on a quarterly basis. The trial court goes on to determine that Consol's interpretation, even if the parties had agreed to it, would have required a modification of the Lease.

Sampson v. Richins, 770 P.2d 998, 1003 (Utah Ct.App. 1989) (quoting *Sorenson*, 614 P.2d at 160). Rather, "[t]he [trial court's factual] findings must be articulated with sufficient detail so that the basis of the ultimate conclusion can be understood." *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899 (Utah 1989). We have examined the trial court's memorandum decision and findings of fact and find them to be well-reasoned and fully supported by the record. It was not necessary for the trial court to negate Consol's version of the case point by point. The trial court needed to make only those findings necessary to its decision, which it has done.

Consol alleges that the trial court erred in finding that the State was not estopped from asserting an 8% royalty rate. This is not the first time we have addressed the estoppel issue in this case. In *Plateau Mining Co.*, the plaintiffs argued that the State's acceptance of lower royalty rates had estopped it from later collecting a higher royalty rate. 802 P.2d at 730. We rejected this basis for estoppel but remanded the case to give the plaintiffs an opportunity to present other evidence that might support a finding of estoppel. *Id.* As noted before, on remand the trial court held a two-day bench trial and ultimately found that Consol had not met its burden of proving that the State was estopped.

Consol makes four arguments on appeal in support of its estoppel claim. It contends that (i) the State made representations inconsistent with its later position; (ii) Consol acted with reasonable prudence and due diligence; (iii) it would suffer injustice if the State is not estopped; and (iv) estoppel in this case would have no substantial adverse effect on public policy.

Consol attempts to portray each of these estoppel arguments as raising both legal and factual issues. Upon examination, however, it appears that Consol is primarily arguing that the trial court erred in finding that Consol did not meet its burden of proving estoppel against the

State. Consol's only potential legal question relating to estoppel is the public policy argument. Nevertheless, we do not reach this argument because we dispose of the estoppel issue on other grounds.

We review a trial court's findings of fact under the clearly erroneous standard. Utah R.Civ.P. 52(a). Consol, as the party challenging those findings, has the heavy burden of marshaling all the evidence in support of the trial court's findings and then showing that those findings are not based on competent, admissible evidence. *Cambelt Int'l Corp. v. Dalton*, 745 P.2d 1239, 1242 (Utah 1987). Consol has not met its burden of marshaling the facts or of showing that the trial court clearly erred in deciding that the State was not estopped.

We briefly review the applicable law. The equitable doctrine of estoppel has three factual predicates: " '(1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.' " *Plateau Mining Co.*, 802 P.2d at 728 (quoting *Celebrity Club, Inc. v. Utah Liquor Control Comm'n*, 602 P.2d 689, 694 (Utah 1979)).

These requirements are expanded when a party is attempting to estop the State or its agents. "The State may not be estopped unless injustice would result [if the State is not estopped] and there would be no substantial adverse effect on public policy." *Id.; see also Utah State Univ. v. Sutro & Co.*, 646 P.2d 715, 718 (Utah 1982). *See generally United States v. Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735-37, 6 L.Ed. 199 (1824) (discussing reasons for denying equitable defenses in actions by the government). Moreover, as a prerequisite to a finding of injustice, the party asserting estoppel must show that it acted with "reasonable prudence and diligence" in relying on

the State's representations. *Morgan v. Board of State Lands*, 549 P.2d 695, 697 (Utah 1976).[9]

Because we find the issue dispositive, we first address Consol's assertion that it acted with reasonable prudence and due diligence. It argues that it acted reasonably in determining the appropriate rate and in relying on the State's alleged representations. It contends that the alternative rate provision was ambiguous and therefore it sought clarification regarding the proper rate from Division personnel. As discussed above, Division personnel told Consol that under the alternative rate provision, it should pay the same rate it was paying the federal government under its federal lease *at the same mine*.[10] Consol had a federal lease at the same mine which at all relevant times carried a 17.5¢ royalty. It argues that the State represented to it that this 17.5¢ royalty rate for the federal lease in the same mine represented the "prevailing" rate being paid by "federal lessees of land of similar character under coal leases issued by the United States at that time," as required by the Lease.

Consol further argues that although it was aware of the FCLAA and the general 8% royalty, a reasonable mine operator, looking at all the federal leases in Utah, would not necessarily have concluded that 8% was the prevailing rate. Therefore, the argument continues, Consol acted reasonably in relying on the Division's alleged representations.

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[9] As we stated in *Morgan v. Board of State Lands*, 549 P.2d 695, 697 (Utah 1976):

> Estoppel arises when a party . . . by his acts, representations, or admissions, or by his silence when he ought to speak . . . induces another . . . to believe certain facts to exist and that such other . . . acting with reasonable prudence and diligence, relies and acts thereon so that he will suffer an injustice if the former . . . is permitted to deny the existence of such facts.

[10] Consol relies on the same evidence it used to support its reasonable-interpretation argument.

We recognize that there is some evidence supporting Consol's claim that it acted reasonably and prudently. Nevertheless, the trial court found otherwise, and after examining the record, we do not find that judgment to be clearly in error.[11]

In particular, the trial court found that Consol's "only action to determine the correct royalty rate was to talk to employees of the Division as to their understanding of the meaning of the royalty provision without making any other inquiries." Consol never sought a written decision from the Board regarding the proper royalty rate.

More important, the trial court found that Consol had failed to inform Division employees and the Board regarding the FCLAA and the 8% royalty. As noted earlier, if there was any doubt as to the appropriate royalty rate, Consol should have disclosed the existence of the FCLAA to the Board and the Division and then sought written clarification. Consol, after withholding information, is not entitled to claim protection under the estoppel doctrine. *See Morgan*, 549 P.2d at 697 n. 4 ("The doctrine of equitable estoppel does not operate in favor of one who has knowledge of the essential facts or who has convenient and available means of obtaining such knowledge.").

Consol's claims of reasonable prudence and due diligence are particularly tenuous given that Consol continued

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[11] The trial court's findings relevant to the estoppel issue can be summarized as follows: (i) The prevailing rate paid by "federal lessees of land of similar character under coal leases issued by the United States at that time" was 8%; (ii) Consol knew or should have known that this was the prevailing rate; (iii) Consol did not act with reasonable prudence and due diligence in ascertaining the correct rate; (iv) Consol failed to inform the State that it was familiar with the FCLAA and the 8% royalty rates thereunder; (v) Consol did not reasonably rely on any representation by the State; (vi) Consol never requested a decision from the Board regarding the royalty rate; and (vii) there is no injustice in requiring Consol to pay the 8% royalty.

to mine coal and to pay only 17.5¢ per ton *even after receiving notice* from the State of the results of the audit and the 8% royalty rate. In fact, Consol mined an additional 251,245 tons of coal from the Lease, which equalled over half of the total amount mined from the Lease. They cannot successfully claim continued reasonable reliance on representations which, even if once made, the State subsequently disavowed.

In sum, "[e]stoppel is a doctrine of equity purposed to rescue from loss a party who has, without fault, been deluded into a course of action by the wrong or neglect of another." *Id.* at 697. Consol is not without fault. Any delusion in this case resulted, at least in part, from its inadequate steps to determine the correct royalty rate and its concurrent failure to disclose all relevant information to the State's agents. Consol had a legal duty to prepare and forward a certified statement indicating the amount of coal produced and the proper royalty rate.[12] We find competent and admissible evidence in the record to support the trial court's determination that Consol did not act with reasonable prudence and due diligence in fulfilling this duty. Because Consol has failed to meet its burden of proving that it acted with reasonable prudence, which is a necessary prerequisite to estoppel, we need not address the remainder of its estoppel arguments.

Consol next contends that the trial court erred in awarding prejudgment interest. According to Consol, the uncertainty inherent in determining the prevailing federal royalty rate precludes the imposition of prejudgment interest in this case. It relies primarily on *Bjork v. April*

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[12] In *Plateau Mining Co. v. Utah Division of State Lands & Forestry*, 802 P.2d 720, 729 (Utah 1990), we concluded that "it cannot be said on this record that the plaintiffs were without fault, or even that they acted with reasonable prudence and diligence in ascertaining the correct rate to be paid." Upon examination of the record now before us, it appears that our appraisal of Consol's conduct in *Plateau Mining Co.* still applies with equal force in this case.

Industries, Inc., 560 P.2d 315 (Utah), *cert. denied*, 431 U.S. 930, 97 S.Ct. 2634, 53 L.Ed.2d 245 (1977), in which this court restated the general rule as to prejudgment interest:

> As to the allowance of interest before judgment, this Court has heretofore spoken, and the law in Utah is clear, viz: where the damage is complete and the amount of the loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that ime and not from the date of the judgment. On the other hand, where damages are incomplete or cannot be calculated with mathematical accuracy, such as in case of personal injury, wrongful death, defamation of character, false imprisonment, etc., the amount of damages must be ascertained and assessed by the trier of the fact at the trial, and in such cases prejudgment interest is not allowed.

Id. at 317 (footnote omitted); *see also Jorgensen v. John Clay & Co.*, 660 P.2d 229, 233 (Utah 1983). Consol asserts that this case is analogous to defamation, false imprisonment, and similar cases in which a trier of fact, to some extent, must subjectively estimate when the damages are complete and the amount of those damages. We disagree.

The Lease required Consol to pay the prevailing rate paid by federal lessees of land of similar character. The trial court found that 8% was the prevailing federal rate at all relevant times. Consol has not alleged that it is or was unable to determine the value of the coal mined. Consequently, the amount of unpaid royalties can easily and accurately be determined by multiplying the value of the coal mined during each royalty period by 8% and then deducting the royalty amounts which were timely paid for that period. The damages were complete and ascertainable as of the date each royalty payment became due and owing. Therefore, Consol owes interest on the

unpaid portion of the royalty payments from the date each payment became due.

Having determined that an award of prejudgment interest is proper, the next issue becomes the appropriate rate of interest. The trial court awarded prejudgment interest at the 6% rate that was provided for in section 15-1-1 at the time the Lease was signed, which would amount to $460,725.38 in interest.[13] The State argues in its cross-

[13] Section 15-1-1 reads:

> (1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.
>
> (2) Unless the parties to a lawful contract specify a different rate of interest, the legal rate of interest *for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.*
>
> (3) Nothing in this section may be construed in any way to affect any penalty or interest charge that by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981.

Utah Code Ann. § 15-1-1 (emphasis added). On the basis of our decision in *SCM Land Co. v. Watkins & Faber*, 732 P.2d 105 (Utah 1986), Consol argues that the prejudgment interest rate in this case is locked into the section 15-1-1 rate that was in effect at the time the Lease was signed, which is 6%.

The author of this opinion has serious reservations about the initial correctness and therefore the continued vitality of *SCM Land* and any other case that purports to tie prejudgment interest rates in all contract cases to the section 15-1-1 rate in effect at the time the contract was signed. *See, e.g., Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 731-32 (Utah Ct.App. 1990). The plain language of section 15-1-1 seems to indicate that the section was intended to apply only to a "loan or forbearance" of "money, goods or chose in action." Utah Code Ann. § 15-1-1. In other words, it provides a default interest rate when the parties have failed to specify an interest rate for "the loan or forbearance of any money, goods, or chose in action that is the subject of their contract." *Id.* The subject of the present contract is the sale of mineral rights, not a loan or forbearance. This was also the case in *SCM Land*. That opinion adopted its view of section 15-1-1's applicability without discussing the limiting language of that section. Nevertheless,

appeal that the trial court should have awarded interest and assessed late-payment penalties at the rates provided for in the Board's rules and regulations.[14] If the trial court had applied the Board's rules and regulations regarding interest and penalties, Consol would have owed $1,473,-856.09 in interest and penalties.[15]

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because the State has failed to raise this issue and its resolution is not necessary for a disposition of this case, we decline to address it.

[14] In his concurring and dissenting opinion, Judge Bench asserts that this issue is governed by the court of appeals' decision in *Trail Mountain Coal Co. v. Utah Division of State Lands & Forestry*, 884 P.2d 1265 (Ct.App.1994), a companion to the present case that we poured to the court of appeals for decision. Judge Bench maintains that *Trail Mountain* is now part of our common law and that while we do have the power to overrule that decision, our authority to do so is limited by *State v. Menzies*, 23 Utah Adv. Rep. 23 1994 WL 110861 (Mar. 29, 1994). In *Menzies*, we explained that under the doctrine of stare decisis, we will follow our *"own precedents . . .* unless [we are] clearly convinced that the [precedent] was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent." *Id.* at 25 (emphasis added) (quoting John Hanna, *The Role of Precedent in Judicial Decision*, 2 Vill.L. Rev. 367, 367 (1957)). Under Judge Bench's expansive reading of *Menzies*, however, this court would be bound to follow not only our own precedents, but also those of the court of appeals. In response, we note simply that Judge Bench misreads *Menzies* and that his understanding of stare decisis is without any support in case law or in academic literature. This court is never bound by decisions of the court of appeals and does not need to overcome any particular hurdles in overruling them.

[15] We review briefly the history of the Board's late payment penalties. Effective November 4, 1982, an interest rate of 1.5% per month was charged to past due royalties. Effective December 31, 1983, an interest rate of 1.5% per month was charged on past due royalties, together with a 6% late fee penalty. Effective July 1, 1986, the Board charged an adjustable interest rate based on the rate charged by the Internal Revenue Service plus 4% on all past due royalties. From July 1986 to the present, the rates charged by the State on delinquent royalties were at times as high as 15%.

As noted above, the State argues that because the Lease involved school trust lands, the Board was authorized by statute and compelled by the state and federal constitutions to promulgate its own interest rates and late-payment penalties.[16] The State further argues that if Consol had paid the proper royalties when due, the funds would have been deposited in one of the school trust accounts and would have earned the same interest rates as did the other trust funds. These trust funds earned significantly more than the statutory rate for the period in question. The statutory rate of 6%, therefore, fails to return "full value" on the funds derived from the Lease. In response, Consol contends that Utah law did not authorize or require the Board to set rates or penalties and the Lease did not empower the Board to set late-payment interest rates and penalties. We agree with the State.

To provide the necessary background, we review briefly the law governing school trust lands. When Utah attained statehood, Congress granted lands to the State for the support of the common schools. Utah Enabling Act ch. 138, §§ 6, 10, 28 Stat. 107 (1894). The State accepted the conditions and obligations of this grant of federal lands by its adoption of article X, section 3 of the Utah Constitution. Utah Const. art. X, § 3 (1896) (current version at Utah Const. art. X, § 5 (1986)). The State thus holds legal title, as trustee, to the school trust lands and the funds generated by those lands. *Duchesne County v. State Tax Comm'n*, 104 Utah 365, 140 P.2d 335, 336 (1943).

The State has an irrevocable duty to manage these trust lands for the sole benefit of the common schools and to receive "full value" from any disposition of its school trust lands. *Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 466, 87 S.Ct. 584, 588, 17 L.Ed.2d

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[16] Although an argument might be made for analyzing the interest rate issue and the penalty issue differently, neither Consol nor the State has elected to do. We therefore decline to do so.

515 (1967);[17] *Plateau Mining Co.*, 802 P.2d at 729; *see also Kadish v. Arizona State Land Dep't*, 155 Ariz. 484, 497, 747 P.2d 1183, 1196 (1987) (holding unconstitutional a statute fixing flat royalty rate for mineral leases on school trust lands), *aff'd*, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989); *cf. Oklahoma Educ. Assoc. v. Nigh*, 642 P.2d 230, 236-37 (Okla.1982) (holding unconstitutional a statute establishing maximum rent chargeable for school trust lands). The State may not alter or abrogate this duty, nor may it make any disposition of the property which conflicts with this duty. *Trustee of Vincennes Univ. v. Indiana*, 55 U.S. (14 How.) 268, 14 L.Ed. 416 (1852). In accordance with the mandate to obtain full value, the State, through its agencies and officers, must manage the trust lands in the most "prudent and profitable manner possible." *Colman v. Utah State Land Bd.*, 17 Utah 2d 14, 403 P.2d 781, 783 (1965).[18] To fulfill its duties and responsibilities, the legislature established the Board of State Lands and gave it the power and authority to set policy for all state lands,

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[17] In *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 96 S.Ct. 910, 47 L.Ed.2d 1 (1976), the United States Supreme Court held that a state could not lease its school trust lands for less than full value. According to the Court:

> [T]he trust is to receive, at the time of its disposition of any interest in the land, the then full value of the particular interest which is being dispensed. . . . Thus, if the lease of trust lands calls for a rental of substantially less than the land's then fair rental value, it is null and void. . . .

Id. at 303, 96 S.Ct. at 916.

[18] Given the trust's purposes, the courts have scrupulously guarded against attempts to dispose of trust assets for less than full value. *See, e.g., Kadish v. Arizona State Land Dep't*, 155 Ariz. 484, 747 P.2d 1183 (1987), *aff'd*, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989); *County of Skamania v. Washington*, 102 Wash.2d 127, 685 P.2d 576 (1984); *see also Department of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948 (1985).

including school trust lands. *See* Utah Code Ann. §§ 65-1-1, -14 (1987) (repealed 1988).[19]

The Board's authority *vel non* to set interest rates and penalties on late royalty payments is a question of law, which we review for correctness. *See Bennion v. ANR Prod. Co.*, 819 P.2d 343, 346 (Utah 1991); *Ward v. Richfield City*, 798 P.2d 757, 759 (Utah 1990).

As noted above, Consol argues that the Board lacked the authority to promulgate interest rates and penalties for leases and instead asserts that this case is governed by section 15-1-1. We agree with Consol insofar as it contends that under our decision in *SCM Land Co. v. Watkins & Faber*, 732 P.2d 105 (Utah 1986), section 15-1-1 would apply if the Board lacked authority to set interest rates and penalties. We conclude, however, that the Board had such authority.

At all times relevant to this case, the Board had broad discretionary authority over the governance of all state lands, including school trust lands.[20] In particular, the legislature vested the Board with the power to "make and enforce rules and regulations not inconsistent with the provisions of this act for carrying the same into effect." Utah Code Ann. § 65-1-97 (1987) (repealed 1988). Further, the Code contained provisions specifically authorizing the Board to make rules and regulations governing mineral leases with the State:

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[19] As noted earlier, the responsibility and authority to manage trust lands is now vested in another government agency. *See supra* note 1 (discussing changes to Utah trust land management system).

[20] Although the Board was authorized by statute to set policy for all state lands, including school trust lands, prior to 1988 the Code did not contain specific discussions as to the Board's duties regarding school trust lands. *See* Utah Code Ann. §§ 65-1-1 to -116 (repealed 1988). In 1988, the legislature clarified that the Board had expansive statutory authority and power to "adopt rules" and policies consistent with the proper administration of state school trust lands. Utah Code Ann. § 65A-1-2 (1993) (amended 1994).

> Except as otherwise provided by law, the State Land Board shall by rules and regulations prescribe the form of application, the form of the lease, the annual rental, the amount of the royalty and the basis upon which the royalty shall be computed, *and such other details as it may deem necessary in the interest of the State.*

Utah Code Ann. § 65-1-23 (1987) (emphasis added) (repealed 1988). Our case law is clear that the legislature intended to give the Board particularly wide discretion in the area of state lands. As we noted in *McKnight v. State Land Board*, 14 Utah 2d 238, 381 P.2d 726, 731 (Utah 1963):

> The Land Board has full power and authority to prescribe necessary and proper rules and regulations to accomplish its purposes and objectives as set out by statute. . . . The provisions of the [act governing state lands] clearly indicate that the Legislature had in mind the distinction between a positive mandate to the Board and a permissive right to take certain actions in its discretion.

Moreover, as the government entity charged with executing the State's responsibilities as trustee of school trust lands, the Board had "such implied powers as [were] reasonably necessary" to effectuate its constitutional mandate to obtain full value and to prudently and profitably manage school trust lands. *See Bennion*, 819 P.2d at 350; *Williams v. Public Serv. Comm'n*, 754 P.2d 41, 50 (Utah 1988).

The Board utilized its discretionary authority to promulgate rules and regulations that provided for late-payment interest and penalties. We find the Board's rules and regulations reasonably necessary, well within its statutory authority, and consistent with its duty to manage school trust lands. These rules serve at least two significant purposes. First, consistent with the State's constitutional duty

to prudently and profitably manage trust lands, they assist in ensuring the proper and timely payment of royalties on mineral leases.[21] Second, and perhaps more important, they guarantee that the State receives full value for the trust lands by setting interest rates that reflect the true value of the royalties which Consol withheld in violation of its Lease.

In short, we conclude that the specific constitutional requirement that the State obtain full value for its school trust lands, in conjunction with the legislature's broad grant of authority to the Board and our case law indicating that the Board has such further implied powers as are reasonably necessary to carry out its constitutional duties, mandates the conclusion that the Board is empowered to set interest rates and penalties regarding school trust lands. Assuming that the interest rates and penalties were adopted in accordance with laws governing the promulgation of administrative rules and regulations—and Consol has not argued otherwise—the imposition of interest and penalties was a proper exercise of the Board's authority over school trust lands.[22]

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[21] Outside the context of school trust lands, we have upheld as constitutional the statutory authority of regulatory agencies to impose civil penalties. *Chris & Dick's Lumber & Hardware v. Tax Comm'n*, 791 P.2d 511, 513-16 (Utah 1990) (upholding commission's imposition of 10% late-payment penalty pursuant to statutory authority plus interest on late tax payments); *Thomas J. Peck & Sons, Inc. v. Public Service Comm'n*, 700 P.2d 1119, 1123 (Utah 1985) (holding that public service commission's statutory authority to impose civil penalty for failure to adhere to Motor Carrier Act is constitutional); *Wycoff Co. v. Public Service Comm'n*, 13 Utah 2d 123, 369 P.2d 283, 285 (1962) (indicating that it is "well established" that the public service commission has the legitimate statutory authority to impose monetary penalties for violation of its lawful orders and regulations).

[22] Judge Bench's opinion, if adopted, would deprive the beneficiaries of the school trust lands of the difference between 6% and the interest rate the trust would have earned if Consol had not violated the terms of the Lease. In other words, Judge Bench

Finally, Consol's argument below, which was adopted by the trial court, that the regulations changed the terms of the Lease, fails to recognize that the Lease is expressly

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would reward Consol, at the expense of the school trust beneficiaries, by allowing it to retain a portion of the royalties in violation of the Lease and then repaying them royalties at a below-market rate of interest that is significantly less than the State would have made on the royalties had Consol simply paid them on time. Judge Bench would, in effect, sanction a de facto below-market-rate loan of funds from the school trust lands to Consol. We have serious questions about the constitutionality of such a result. *Cf. Kadish*, 747 P.2d 1183; *see also Oklahoma Educ. Assoc. v. Nigh*, 642 P.2d 230 (1982). Similarly, Consol's analysis disallowing the Board's rules and regulations governing interest rates and applying section 15-1-1 would result in a de facto loan from school trust lands at below-market rates of interest.

Given that the Utah Enabling Act and state and federal constitutions "unequivocally demand" that the trust fund be paid the full value of any minerals transferred from it, we have serious doubts that the application of 15-1-1 in this case would withstand constitutional scrutiny. *See Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 466, 87 S.Ct. 584, 588, 17 L.Ed.2d 515 (1967); *see also Kadish*, 747 P.2d 1183. Nevertheless, "[i]t is a fundamental rule that we should avoid addressing a constitutional issue unless required to do so. As a corollary of that principle, we construe statutes, if possible, to avoid the risk of running afoul of constitutional prohibitions." *State v. Wood*, 648 P.2d 71, 82 (Utah 1982) (citations omitted), *cert. denied*, 459 U.S. 988, 103 S.Ct. 341, 74 L.Ed.2d 383 (1982); *State v. Bell*, 785 P.2d 390, 397 (Utah 1989). We therefore decline to construe section 15-1-1 as broadly, or the Board's authority as narrowly, as Consol would have us do. We instead choose to harmonize the interest rate provision with the provisions governing school trust lands by holding that the Board has the power to set rules and regulations consistent with its duty to manage school trust lands. As we recognized in *McKnight v. State Land Board*, 14 Utah 2d 238, 381 P.2d 726 (1963):

> "Rules made in the exercise of a power delegated by statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason. . . . If it can be fairly done, [an administrative] rule should be construed and applied as to make it conform to the powers conferred upon the adminis-

subject to the laws of Utah.[23] The Lease provides that it was "granted subject . . . [to] the conditions of the laws of the State of Utah." *Cf. Rosebud Coal Sales Co. v. Andrus*, 667 F.2d 949, 951 (10th Cir.1982) (indicating that federal coal leases must be considered in context of federal Mineral Leasing Act). The laws of Utah include not only the statutes which authorize the Board to govern school trust lands, but also the constitutional requirement that the State manage its lands in the most prudent and profitable manner possible and receive full value for its

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trative body, rather than as being an assumption of power not conferred."

Id. 381 P.2d at 731 (quoting 42 Am.Jur.*Public Admin.Law* § 101).

[23] Consol's claim that the regulations change the terms of the Lease also fails to recognize the fundamental difference between interest provided for by contract and interest provided as damages:

> A distinction exists between interest stated by the terms of a contract to be paid before its breach and interest recoverable by way of damages after a breach, although the term "interest" is often used indiscriminately to describe both amounts. Contractual interest is the creature of contract and is recoverable only as provided by its terms. When the agreement is violated, however, the non-defaulting party has sustained a wrong for which the law gives him redress by way of damages, including, in many cases, interest for retention of the funds due on breach.

22 Am.Jur.2d *Damages* § 649 (1988) (footnotes omitted). Consol breached the contract when it failed to calculate and submit the proper amount of royalties on a quarterly basis. The issue, therefore, is not necessarily what remedy the contract provides, but what remedy the law will provide to the State in light of Consol's breach. *See id.* Consol's contractual duty was to determine and submit its royalties on a timely basis. The State's constitutional and statutory duty was to then take those royalties and manage them prudently and profitably. Consol breached the contract by failing to perform its duties under the contract, which prevented the State from investing the money in the state school trust funds and thereby properly fulfilling its duty. The State is entitled to be made "whole," that is, to recover what it would have made in interest on the unpaid royalties if Consol had paid the royalties in a timely manner.

school trust lands. In other words, the Lease is expressly subject to the trust and the State's regulatory power to enforce the terms of the trust.[24] *Cf. id.*

Further, even if the Lease did not contain an express provision subjecting it to the terms of the trust, Consol took the Lease with notice of, and subject to, the law governing school trust lands and the trust responsibilities of the State. *See ASARCO v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989). In short, the State has reserved the power to enforce the terms of the Lease and to make other rules and regulations in furtherance of its constitutional duty to manage school trust lands.

On the basis of the above, we hold that the Board's rules and regulations prescribing interest rates and penalties on late payments were a proper exercise of its broad statutory authority to manage the trust lands and to guarantee that the school trust fund receives full value for he trust property. We remand this case to the trial court to determine, consistent with this opinion and the Board's rules and regulations, the proper interest charges and late-payment penalties.

We have considered the rest of Consol's arguments and find them to be without merit. We affirm in part, reverse as to the proper interest rate and penalties, and remand for further proceedings as indicated above.

HOWE and DURHAM, JJ., concur.

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[24] For example, we recognized in *Plateau Mining Co.* that the State had the power to audit the books and records of the plaintiffs to determine compliance, even though there was no language to that effect in the Lease. 802 P.2d at 730.

BENCH, Judge, concurring and dissenting:

I concur in the majority's determination that the State is entitled to additional royalties from Consol. I dissent, however, from the majority's conclusion that section 15-1-1 does not apply in this case and in its decision to allow the Board unilaterally to modify the interest rate on amounts owed under its existing contracts.

Statutory Prejudgment Interest.

The trial court was clearly correct in awarding prejudgment interest pursuant to section 15-1-1. This statute has consistently been interpreted to specify the prejudgment interest rate where it is not specified in the contract. *See, e.g., Lone Mountain Prod. Co. v. Natural Gas Pipeline Co.*, 984 F.2d 1551, 1561 (10th Cir.1992); *Nielsen v. O'Reilly*, 848 P.2d 664, 669-70 (Utah 1992) (section 15-1-1 establishes legal rate of prejudgment interest in breach of contract claim); *SCM Land Co. v. Watkins & Faber*, 732 P.2d 105, 108-09 (Utah 1986) (section 15-1-1 governs interest rate on prejudgment interest rate where no rate is specified by contract); *Lignell v. Berg*, 593 P.2d 800, 809 n. 14 (Utah 1979) (same); *Mont Trucking, Inc. v. Entrada Indus.*, 802 P.2d 779, 782 (Utah Ct.App. 1990) (Utah law provides that section 15-1-1 governs interest in all contracts when parties have not specified rate); *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 731-32 (Utah Ct.App.1990) (section 15-1-1 governs prejudgment interest where contract does not specify interest rate); *Ringwood v. Foreign Auto Works Inc.*, 786 P.2d 1350, 1358 (Utah Ct.App.1990) (same); *Price-Orem v. Rollins, Brown & Gunnell*, 784 P.2d 475, 482 (Utah Ct.App.1989) (same); *Mason v. Western Mortgage Loan Corp.*, 754 P.2d 984, 987 n. 2 (Utah Ct.App.1988) (same); *Davies v. Olson*, 746 P.2d 264, 270 (Utah Ct.App.1987) (same).[1]

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[1] Chief Justice Zimmerman's individualized dicta attacking this well-established line of cases is unfounded. Justice Zimmerman

The Utah Court of Appeals recently addressed the very issue here presented in *Trail Mountain Coal Co. v. Division of State Lands & Forestry*, 884 P.2d 1265 (1994). In fact, *Trail Mountain* is a companion case to the present case.[2] On the basis of the same relevant facts, the court of appeals determined, in accordance with existing authority, that section 15-1-1 controls prejudgment interest when the contract is silent. The court of appeals stated in pertinent part:

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suggests that because the contracts were for the sale of goods (mineral rights), they are not a "loan or forbearance." Justice Zimmerman misapprehends the purpose of section 15-1-1 and prejudgment interest. Prejudgment interest is designed to compensate the nonbreaching party that finds itself, by virtue of the breach, in the position of loaning money or forbearing what is owed by the breaching party. *See* 22 Am.Jur.2d *Damages* § 82 (1988); *see also L & A Drywall, Inc. v. Whitmore Constr. Co.*, 608 P.2d 626, 630 (Utah 1980) (prejudgment interest represents interest on amount awarded as damages due to party's failure or delay in paying amount under contract); *Fitzgerald v. Critchfield*, 744 P.2d 301, 304 (Utah Ct.App.1987) (prejudgment interest is that interest owed on overdue debt from date debt became overdue until entry of judgment). Therefore, because of the underpayment of royalties by Consol, the State found itself in the position of loaning or forbearing money it was owed.

[2] Several mining companies, including Consol and Trail Mountain, entered into leases with the Division of State Lands using the same lease form. Following an audit, the Division of State Lands notified these companies that they had underpaid their royalties. The mining companies brought separate declaratory judgment actions, seeking determinations of their rights and obligations under the lease agreement. In all cases, the trial court granted relief in favor of the mining companies. The State appealed the rulings. This court consolidated the cases and reversed and remanded for the trial court to take evidence on the interpretation of the lease agreement, among other things. *See Plateau Mining Co. v. Division of State Lands & Forestry*, 802 P.2d 720 (Utah 1990). Following a trial on remand, the trial court ruled in favor of the State. Consol and Trail Mountain filed separate appeals. This court transferred Trail Mountain's appeal to the court of appeals pursuant to rule 42 of the Utah Rules of Appellate Procedure but retained Consol's appeal.

> The trial court ruled that the State Land Board had no authority to unilaterally change the applicable rate of interest and to impose penalties not mentioned in the lease. We agree. As previously noted, Utah law establishes the rate of prejudgment interest "[e]xcept when parties to a lawful contract agree on a specified rate." Utah Code Ann. § 15-1-1 (1992). Trail Mountain and the Division did not agree on a specified rate of prejudgment interest, nor to the imposition of penalties for the late payment of royalties.

Trail Mountain, 884 P.2d at 1273. Therefore, not only is section 15-1-1 applicable to prejudgement interest generally, but there is a specific case in this jurisdiction holding that section 15-1-1 is applicable to the precise lease being interpreted in this case.

By transferring the *Trail Mountain* appeal to the court of appeals, this court authorized the court of appeals to address and answer the question, which it has now done in accordance with existing authority. *See Conder v. A.L. Williams & Assoc.*, 739 P.2d 634, 636 (Utah Ct.App. 1987) (when case is transferred from supreme court, court of appeals stands in supreme "court's shoes for all purposes pertinent to the case"). In any event, *Trail Mountain* was decided in a published opinion by an appellate court of this jurisdiction, and it is now part of our common law. Until altered by this court or by the legislature, it is the law that must be followed in this jurisdiction by judges, practitioners, and the public.

Of course, this court has the power to alter the common law by overruling *Trail Mountain* and the cases cited therein. However, the overruling of existing case law should not be done lightly. *State v. Menzies*, 235 Utah Adv.Rep. 23, 1994 WL 110861 (Mar. 29, 1994). To overrule the rule of law established in earlier cases, this court should explain how it came to be "clearly convinced [1] that the rule was originally erroneous or is no longer

sound because of changing conditions and [2] that more good than harm will come by departing from precedent." *Id.* (quoting John Hanna, *The Role of Precedent in Judicial Decision*, 2 Vill.L.Rev. 367, 367 (1957)). Mere disagreement with the common law "certainly does not satisfy *Menzies*' careful requirements for overruling prior case law." *White v. Deseelhorst*, 879 P.2d 1371, 1377 (Utah 1994) (Zimmerman, C.J., concurring). This court must therefore either follow existing precedent or, in a very disciplined way, overrule existing precedent so as to alter the common law. At the very minimum, *Trail Mountain* must be treated as persuasive authority. The failure to address existing precedent will "produce unacceptable indeterminacy in the law and . . . undermine confidence in its institutions." *State v. Thurman*, 846 P.2d 1256 (Utah 1993).

The majority does not give even lip service to *Trial Mountain* and the cases cited therein. Instead, the majority strains to avoid the operation of section 15-1-1 by engaging in a rather tortured analysis of the State's responsibilities under the Utah Enabling Act. The majority correctly indicates that the State has the responsibility to manage trust lands "for the sole benefit of the common schools and to receive 'full value' from any disposition of its school trust lands." The cases cited by the majority, however, support only the notion that the State must get "full value" *at the time it enters into a contract* for the disposition of school trust lands. For example, in *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 96 S.Ct. 910, 47 L.Ed.2d 1 (1976), the Supreme Court stated, "Full appraised value is to be determined and measured at the time of the disposition of the respective interests, and if the State receives those values at those respective times, the demands of the Enabling Act are met." *Id.* at 307, 96 S.Ct. at 918. A contract for less than fair value is to be considered simply "null and void." *Id.* at 304-05 96 S.Ct. at 917.

In the present case, there has been no allegation that Consol leased the trust property for less than full value. In fact, the lease actually included an escalator provision to insure that the State received full value for the duration of the lease. The requirement that the State receive full value at the time of the disposition of the State's interest is a far cry from authorizing the State unilaterally to modify material terms of its existing contracts. In none of the cases cited by the majority was the state allowed to enforce a contract and, at the same time, to vary its terms.

In support of its conclusion that the Board can unilaterally modify an existing contract, the majority notes that the lease between Consol and the State is subject to the laws of Utah in existence when the lease was signed. The majority essentially points at Consol, claiming that it should have known it was taking a lease subject to the requirement that the State receive full value for any disposition of its trust lands. The majority ignores, however, the fact that section 15-1-1 was also in effect when the lease was signed. Consistent with the majority's own analysis, the lease between Consol and the State is governed by section 15-1-1. *See Lone Mountain*, 984 F.2d at 1561; *Nielsen*, 848 P.2d at 669-70; *SCM* Land, 732 P.2d at 108-09; *Lignell*, 593 P.2d at 809 n. 14; *Trail Mountain*, 884 P.2d at 1273; *Mont Trucking*, 802 P.2d at 782; *Breuer-Harrison*, 799 P.2d at 731-32; *Ringwood*, 786 P.2d at 1358. *Price-Orem*, 784 P.2d at 482; *Mason*, 754 P.2d at 987 n. 2; *Davies*, 746 P.2d at 270.

The lease agreement was signed in 1968. Section 15-1-1, in force in 1968, provided that the statutory prejudgment interest rate in contracts was 6%. Thus, under the rules of contract formation, a prejudgment interest rate of 6% was integrated into the contract between the State and Consol. *See SCM Land*, 732 P.2d at 108-09 (rate of interest is governed by statutory rate in effect when contract was entered into); *accord Lone Mountain*,

984 F.2d at 1561. The State has no authority to modify, unilaterally and at-will, the statutory interest rate in effect when the parties entered into the contract.[3]

The Agency Rule

The majority concedes that section 15-1-1 would apply if the Board lacked authority to modify the statutory rate of interest. The majority then erroneously concludes that the Board had such authority.

Administrative agencies possess only such rule-making authority as the legislature has expressly delegated to them. *See Crowther v. Nationwide Mut. Ins. Co.*, 762 P.2d at 108-09; *Lignell*, 593 P.2d at 809 n. 14; *Trail* tled] that the legislature may not delegate authority' to a Board 'to adopt rules or regulations which abridge, enlarge, extend or modify the statute creating the right or imposing the duty.'" *IML Freight, Inc. v. Ottosen*, 538 P.2d 296, 297 (Utah 1975) (quoting *McCulloch v. Ashby*, 73 N.M. 267, 387 P.2d 588 (1963)). *Crowther* held as follows:

> Administrative regulations "may not conflict with the design of an Act, and when they do the court has a duty to invalidate them. . . . Furthermore, when an administrative official misconstrues a statute and issues a regulation beyond the scope of a statute, it is in excess of administrative authority granted." *Travelers Indem. Co. v. Barnes*, [191 Colo. 278] 552 P.2d 300, 303 (Colo.1976). It is the prerogative

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[3] Under the majority's analysis of this case, the State can be entitled only to what the majority defines as "full value." The majority defines "full value" as the rate the State would have earned had the money owed by Consol been invested in a manner similar to other state trust funds. The State is not, as a matter of law, entitled to the arbitrary interest set by the Board at rates as high as 22 to 24%. Under the majority's own analysis, this case must be remanded for a determination of "full value" in the context of the interest earned by other state trust funds during the period in question.

> and responsibility of the legislature to set policy and that responsibility may not be constitutionally delegated to an agency under its rule-making authority.

Crowther, 762 P.2d at 1122; *see also McKnight v. State Land Bd.*, 14 Utah 2d 238, 244, 381 P.2d 726, 730 (1963) ("[R]ules and regulations of an administrative agency must conform to rather than be contrary and inconsistent with statutory law.").

The majority holds that Utah Code Ann. § 65-1-23 (1987) grants the State authority to change the statutory rate of interest and thereby to unilaterally manipulate the terms of its existing contracts. Section 65-1-23, at all times relevant to this appeal, provided as follows:

> Except as otherwise provided by law, the State Land Board shall by rules and regulations prescribe the form of the application, the form of the lease, the annual rental, the amount of royalty and the basis upon which the royalty shall be computed, *and such other details as it may deem necessary in the interest of the State.*

Id. (emphasis in majority opinion), *repealed by* Trust Land Management Act ch. 121, § 18, 1988 Utah Laws 548, 566. Under the majority's anaysis, the emphasized language in this section provides the State with carte blanche authority to modify existing legal contracts to the State's advantage. This very argument was addressed in *Trail Mountain*, where the court of appeals expressly held:

> Nor does the statutory grant of rulemaking authority to the State Land Board, found in Utah Code Ann. § 65-1-23 (1986), allow the Board to change the material terms of the lease by subsequent rule. While section 65-1-23 authorizes the Board, "[e]xcept as otherwise provided by law," to establish rules and regulations prescribing the form of application, the form of lease, the amount of royalties and so forth, it says nothing about permitting the Board to

> retroactively alter existing leases. Nor does the "other details" language contemplate something as significant as a deviation from the generally prevailing statutory interest scheme. As already noted, Utah Code Ann. § 15-1-1 (1992) establishes the statutory rate for prejudgment interest in cases where the parties have not contractually agreed upon a rate.
>
> Accordingly, we conclude that neither the lease language contemplating changes in operating rules nor the grant of authority found in section 65-1-23 provide[s] a basis for altering the monetary terms of the lease, either in terms of deviating from the statutory rate of prejudgment interest or in assessing late fees. Therefore, we deny the Division's cross-appeal seeking a higher interest rate and late fees and affirm the trial court's decision in that respect.

Trail Mountain, 884 P.2d at 1273.

Certainly section 65-1-23 authorizes the Board to *negotiate* a prejudgment interest rate higher than that provided by statute. If interest is not specified in the lease, however, this statute cannot reasonably be interpreted to allow the Board to change the statutory rate of interest. The plain language of the statute does not permit the agency, at any time, to promulgate rules that are inconsistent with provisions "otherwise provided by law." *Id.* An administrative rule out of harmony or in conflict with the express provisions of a statute "would in effect amend that statute." *Olson Constr. Co. v. State Tax Comm'n*, 12 Utah 2d 42, 45, 361 P.2d 1112, 1113 (1961). Therefore, even if section 65-1-23 could be construed to allow the agency to provide for prejudgment interest when not provided by contract, the agency rule cannot "trump" section 15-1-1. *See Crowther*, 762 P.2d at 1122.[4]

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[4] The majority also relies on Utah Code Ann. § 65A-1-2 (1993), a provision first passed by the legislature long after the lease was signed any the rule was promulgated. The majority argues that

Section 15-1-1 would control, in any event, because it is the most specific statute. *See State v. Burnham*, 87 Utah 445, 449, 49 P.2d 963, 965 (1935) ("It is a general rule of statutory construction that where two statutes treat the same subject-matter, the one general and the other [specific] in its provisions, the [specific] provision controls."); *accord Cannon v. Gardner*, 611 P.2d 1207, 1209 (Utah 1980); *Floyd v. Western Surgical Assoc.*, 773 P.2d 401 (Utah Ct.App.1989). The statutes relied upon by the majority do not even mention interest rates.

Impairment of Contract

Consol correctly argues that if the Board can modify its existing contracts, then the statutes and rules relied upon run headlong into constitutional prohibitions. The Federal Constitution provides for the protection of consensual contractual rights by stating that no State shall pass any "law impairing the obligations of contracts." U.S. Const. art. I, § 10. Utah's Constitution similarly states that no "law impairing the obligations of contracts shall be passed." Utah Const. art. I, § 18.

It is a fundamental principle of constitutional law that a state may not pass a law altering the nature and legal effect of an existing contract to the prejudice of either party to the contract. *See Pulos v. James*, 261 Ind. 279, 302 N.E.2d 768, 775 (1973). It is likewise a fundamental principle of constitutional law that the state may not pass a law altering a contractual remedy when the remedy is material ot the contract. *Kirkman v. Bird*, 22 Utah 100, 111-12, 61 P. 338, 339-40 (1900) ("The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that

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this statute clarifies that the "Board had expansive authority and power to 'adopt rules' and policies consistent with the proper administration of state school trust lands." However, like section 65-1-23, section 65A-1-2 does not authorize the Board to change the statutory rate of interest.

remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is therefore void.").

"Any law which changes the intention and legal effect of the original parties, giving to one a greater or the other a less interest or benefit of the contract, impairs its obligations." 16A Am.Jur.2d *Constitutional Law* § 695 (1979) (citing *Kentucky Util. Co. v. Carlisle Ice Co.*, 279 Ky. 585, 131 S.W.2d 499 (1939)). "Law" for purposes of impairment has been defined to mean "[a]ny enactment, from whatever source it originates, to which a state gives the force of law." *Id.* § 699. This includes "acts of the legislature, municipal ordinances passed pursuant to legislative authority, rules and orders by an instrumentality of the state exercising delegated authority, and state constitutions and constitutional amendments." *Id.* § 701. Absent a compelling state interest, the state may not pass a law impairing its own contracts with private parties. *Id.* § 694.[5]

In the present case, the parties did not specify a prejudgment interest rate. Because the parties were silent on the issue of prejudgment interest, as indicated by existing authority, including *Trail Mountain*, section 15-1-1 was incorporated by operation of law into the contract.[6] This

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[5] Assuming, but not conceding, that the state can constitutionally impair obligations like the one in the instant case, such ruling can be given only prospective application. *See, e.g.*, 16A Am.Jur.2d *Constitutional Law* § 689 (1979) (statute tending to impair contractual obligations, if assumed to be valid, may not be given retroactive effect so as to impair contracts already in existence without violating Constitution).

[6] The majority attempts to avoid the operation of section 15-1-1 by claiming that there is a distinction in this case between "interest provided for by contract and interest provided as damages." The majority argues that the State is entitled to expectancy damages—the amount that the State "would have made in interest on the unpaid royalties if Consol had paid the royalties in a timely manner." Whatever the majority may choose to call the type of

provision in the contract was material in that it set the penalty Consol was to be charged if it became delinquent in its royalty payments. At the interest rate specified by section 15-1-1, Consol would owe the State $460,725.38 in unpaid prejudgment interest, but according to the majority, under the Board's later-promulgated rule governing prejudgment interest, Consol would owe $1,473,856.09 in prejudgment interest. The majority has allowed the State, through the Division of State Lands, to impair a material remedy and obligation in its own contract with Consol to its own benefit of over one million dollars. Such an impairment of contract is prohibited by the Federal and State Constitutions.[7]

Conclusion

In accordance with existing authority, including *Trail Mountain*, I would hold that section 15-1-1 governs the prejudgment interest rate in the contract between the State and Consol. The State may not unilaterally modify the terms of its own contract to its own benefit. The majority's holding impairs the contract between the State and Consol in violation of both the Federal and State Constitutions.

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damages applicable in this case, the only damages recoverable "for a breach of the obligation to pay money is the amount due, with interest thereon at the legal rate. The interest is technicallly damages awarded for the delay in payment." 22 Am.Jur.2d *Damages* § 82 (1988). This type of damage has consistently been defined by our courts as prejudgment interest. *See, e.g., L & A Drywall, Inc. v. Whitmore Constr. Co.*, 608 P.2d 626, 630 (Utah 1980); *Fitzgerald v. Critchfield*, 744 P.2d 301, 304 (Utah Ct.App.1987).

[7] When, in 1981, section 15-1-1 was amended to increase the prejudgment interest from 6 to 10%, the legislature expressly provided that the amendment does not affect contracts entered into before 1981. Utah Code Ann. § 15-1-1(3). The legislature apparently recognized that it could not constitutionally modify contracts then in existence.

HALL, Justice, did not participate herein; BENCH, Court of Appeals Judge, sat.

STEWART, Associate Chief Justice, does not participate herein.

APPENDIX F

SUPREME COURT OF UTAH
STATE OF UTAH
SALT LAKE CITY, UTAH

August 23, 1996

OFFICE OF THE CLERK

No. 940556
930226-CA
4847

TRAIL MOUNTAIN COAL COMPANY,
Plaintiff, Respondent,
and Cross-Petitioner,

v.

THE UTAH DIVISION OF STATE LANDS AND FORESTRY, RALPH MILES, DIRECTOR OF THE DIVISION OF STATE LANDS AND FORESTRY; *et al.*,
Defendants, Petitioners,
and Cross-Respondents.

The petition for rehearing is denied.

GEOFFREY J. BUTLER
Clerk

APPENDIX G

RULES AND REGULATIONS GOVERNING
THE ISSUANCE OF MINERAL LEASES
of the Utah Board of State Lands & Forestry
and the Utah Division of State Lands and Forestry

Rule 3(C)(2) (Revised to include amendments effective November 4, 1982):

An overdue royalty fee of 1.5% per month shall be charged on any amounts of production royalty which are owing the State and have not been paid within the time limit specified in the mineral lease under which such production royalty is due.

Rule 3(C)(2) (Revised to include amendments effective December 26, 1983):

Payment of a 6% penalty fee shall be required of lessee on all delinquent royalty. In addition, lessee shall be required to pay lessor interest fees of 1.5% per month on all amounts of outstanding overdue royalty.

Rule M3a2(5)(f) (Revised to include amendments effective July 1, 1986):

Interest shall be compounded semiannually based on the average adjusted prime rate, rounded to the nearest full percent, for each six-month period computed from April to September and October to March (as published by the Internal Revenue Service, plus four percent (4%). The interest rate will be subject to change at six-month intervals every *July 1st*, and *January 1st*. This interest rate will be applied to any delinquent royalty and will be in effect until payment is received.

APPENDIX H

IN THE SEVENTH JUDICIAL DISTRICT COURT
STATE OF UTAH
EMERY COUNTY

Civil No. 4847

TRAIL MOUNTAIN COAL COMPANY,
Plaintiff,

vs.

THE UTAH DIVISION OF STATE LANDS & FORESTRY; RALPH MILES, DIRECTOR OF THE DIVISION OF STATE LANDS & FORESTRY; THE UTAH DEPARTMENT OF NATURAL RESOURCES; DEE HANSEN, EXECUTIVE DIRECTOR OF THE UTAH DEPARTMENT OF NATURAL RESOURCES,
Defendants.

TRIAL

Volume Three

BE IT REMEMBERED that on the 19th day of March, 1992, the above-entitled action was held before the HONORABLE BOYD BUNNELL, sitting as Judge in the above-named Court, and that the following further proceedings were had.

* * * *

[414] PROCEEDINGS

March 19, 1992

THE COURT: Good morning, gentlemen, and ladies. Mr. McKeachnie, you may proceed with your summation that you care to make to the Court at this time.

MR. CURTIS: Your Honor, there's one matter I need to bring up first, if I may.

THE COURT: All right.

MR. CURTIS: There is one exhibit, Exhibit 109, that was not within our general motion to have the exhibits admitted, but both parties agree that it may come into evidence.

THE COURT: All right. Exhibit 109 is received.

Let's see, just for the record, what is it?

MR. CURTIS: It is a letter to John Blake from Allen Childs dated July 11th, 1985.

THE COURT: All right. Thank you.

MR. McKEACHNIE: May it please the Court and Counsel. Mr. Allred will help me with this argument, your Honor, and he will cover the interest and penalty issues and what we have to say about the claim for a transportation deduction.

As I started to get ready for this argument this morning and pulled out my notes from the argument at the [415] Supreme Court, I found that I could use most of them here this morning, because what has turned out—as it has turned out, much of what was covered in the last two days by way of evidence were the kinds of things that we were arguing at the time at the Supreme Court.

So, I think that the Supreme Court opinion gives us some pretty good guidance on what the Court ought to do on that.

To start with, however, I played around with some numbers, I realize this isn't evidence, but it's based on evidence. Our Exhibit 5, which is the recap of activity for this particular mine during the period we're involved with, sets forth the tons sold, sales value of those tons and the royalty paid. And so I just took the tons sold column and added up the totals, because they're on Schedule 5 as they were reported quarterly.

So when I multiplied that by the price per ton in each of those quarters and totaled that column. And so we see that what we're talking about here is, during the period in question, we have 2,000,000 tons-plus, which were sold by Trail Mountain Coal for $49 million plus.

The gross sales value multiplied by eight percent would generate $3,925,817. Remember, in the exhibits is the agreement of sublease between Federol and Trail Mountain, it calls for an eight percent royalty, overriding royalty. So [416] would be the calculation of what Federol was paid in overriding royalty, in addition to the $4 million cash price spelled out in that transaction when Natomas bought from those shareholders of Trail Mountain.

So we then take the number of tons times 15¢ and we see what the school trust received from this production; $294,201.

Just to summarize those numbers, income to Trail Mountain from the mine during the period in time amounts to $49 million; four million in cash went to Federol, 3.6 went to—3.9 to the shareholders of Trail Mountain when they sold to Natomas, and the State school trust received $294,000.

Now, one other thing, I've put on the board here the numbers that Lisa Schneider testified about in her testimony.

The State is claiming an unpaid royalty of $3,631,615.15. A penalty of $44,349.79, interest of $6,105,3—638.22, or a total amount of 9,781,603.54.

Now, why do I think those numbers are relevant to the distinction that the Court has to make? The first thing that the Supreme Court said in its opinion is that the background, a brief explanation of the nature of school trust lands provides a background for the application of governing legal principles in this case.

* * * *

APPENDIX I

[Trial Exhibit 7, Letter to John L. Bell
from C.J. Brinton dated October 4, 1976]

October 4, 1976

John L. Bell
P.O. Box 356
Orangeville, Utah
84537

Dear Mr. Bell:

Following your recent visit to this office, I have reviewed the royalty provisions of State of Utah coal lease ML 22603 with our Assistant Director, Mr. Prince. ARTICLE III, Paragraph Second of said lease which contains the royalty provisions reads as follows:

SECOND:

> To pay to Lessor quarterly on or before the 15th day of the month succeeding each quarter, royalty
>
> (a) at the rate of 15 cents per ton of 2000 lbs. of coal produced from the leased premises and sold or otherwise disposed of, or
>
> (b) at the rate prevailing, at the beginning of the quarter for which payment is being made, for Federal leases of land of similar character under coal leases issued by the United States at that time,
>
> whichever is higher, and commencing with the year beginning the Janauary 1 following two years from the date hereof, to pay annual royalty of at least $1.00 multiplied by the number of acres hereby leased regardless of actual production, provided that Lessor may, at any time after the tenth anniversary date hereof, increase the minimum annual royalty but not to exceed 50 percent.

> If the coal produced from the leased premises is washed before sale or other disposition by Lessee, Lessee may pay royalty on the washed product only, provided Lessee maintains accurate record by which the weight of washed coal originating from the leased premises can be ascertained and complies with all regulations and directives issued by Lessor to prevent waste and to insure that royalty is paid on all washed coal originating from the leased premises.

At the time of your visit, you desired some clarification of the policy of this office regarding parts (a) and (b) of this section. Since this lease contains a royalty rate of 15 cents per ton, this will be the rate until one of two situations which could alter this rate occur. First Part (b) provides that the royalty can be changed to the rate payable under Federal leases in the same area. This change would be made at such time as the Federal lease in question begins production. Second, the introductory paragraph of this lease provided for the readjustment of the lease terms at the end of each 20-year period of the lease term. Under this provision, the lease terms, including the royalty rate, will be reviewed as of December 31, 1985, and I am sure the rate will be changed to the royalty rate in use at that time.

I hope this will be of aid to you.

Yours very truly,

C.J. BRINTON
Economic Geographer

CJB/bp

APPENDIX J

COMPARISON OF THE RATES OF RETURN REALIZED BY THE SCHOOL TRUST ACCOUNT WITH RATES OF RETURN TO THE FEDERAL GOVERNMENT, COMMERCIAL ENTITIES AND THE STATE

Year/ Quarter	School Trust Fund Return Rate (Annual Avg.)	IRS Interest Rates on Overpayments And Underpayments	U.S. Treasury Notes and Bonds 5-Year Constant Maturity (Annual Avg.)	Prime Interest Rates as obtained from Zions Bank (Annual Avg.)	Rounded Adjusted Average +4% (Apr.- Sept. to be Eff. the following Jan 1) & (Oct.-Mar. to be Eff. the following July 1)	Interest Rate Applicable to Trail Mtn.by Statutes/ Regulations
4th	9.95%	20%		11.83%		6% (10/1/82-11/3/82) 18% (11/4/82-12/31/82)
1983 1st	(9.13%) 8.08%	16%	(10.80%)	(10.75%) 10.67%		18%
2nd	9.28%	16%		10.50%		18%
3rd	9.56%	11%		10.83%		18%
4th	9.63%	11%		11.00%		18%
1984 1st	(10.64%) 9.83%	11%	(12.24%)	(12.12%) 11.17%		18%
2nd	11.55%	11%		12.33%		18%
3rd	10.60%	11%		13.00%		18%
4th	10.60%	11%		12.00%		18%
1985 1st	(10.53%) 10.54%	13%	(10.13%)	(9.97%) 10.58%		18%
2nd	11.88%	13%		10.33%		18%
3rd	9.19%	11%	9.77%	9.50%		18%
4th	10.51%	11%	9.23%	9.50%	10/1/85-3/31/86 Avg.= 9.42% or 9+4%=13% to be Eff. 7/1/86-12/31/86	18%
1986 1st	(9.21%) 10.23%	10%	(7.31%) 8.16%	(8.33%) 9.33%		18%
2nd	10.65%	10%	7.40%	8.67%	4/1/86-9/30/86 Avg. = 8.25% or 8+4%=12% to be Eff. 1/1/87-6/30/87	18%
3rd	7.97%	9%	6.93%	7.83% (8.25%)		13%
4th	8.00%	9%	6.75%	7.50%	10/1/86-3/31/87 Avg. = 7.50% or 8+4%=12% to be Eff. 7/1/87-12/31/87	
1987 1st	(8.23%) 8.22%	8%	(7.94%) 6.74%	(8.18%) 7.50%		12%
2nd	8.32%	8%	7.95%	8.00%	4/1/87-9/30/87 Avg. = 8.21% or 8+4%=12% to be Eff. 1/1/88-6/30/88	
3rd	8.05%	8%	8.42%	8.42%		12%

Year/ Quarter	School Trust Fund Return Rate (Annual Avg.)	IRS Interest Rates on Overpayments And Underpayments	U.S. Treasury Notes and Bonds 5-Year Constant Maturity (Annual Avg.)	Prime Interest Rates as obtained from Zions Bank (Annual Avg.)	Rounded Adjusted Average +4% (Apr.- Sept. to be Eff. the following Jan 1) & (Oct.-Mar. to be Eff. the following July 1)	Interest Rate Applicable to Trail Mtn.by Statutes/ Regulations
4th	8.37%	9%	8.63%	8.83%	10/1/87-3/31/88 Avg. 8.72% or 9+4%=13% to be Eff. 7/1/88-12/31/88	12%
1988 1st	(8.40%) 8.44%	10%	(8.47%) 7.91%	(9.30%) 8.60%		12%
2nd	8.40%	9%	8.42%	8.77%	4/1/88-9/30/88 Avg. 9.23% or 9+4%=13% to be Eff. 1/1/89-6/30/89	
3rd	8.35%	9%	8.76%	9.68%		13%
4th	8.23%	10%	8.80%	10.17%	10/1/88-3/31/89 Avg. 10.55% or 11+4%=15% to be Eff. 7/1/89-12/31/89	
1989 1st	(8.94%) 9.05%	10%	(8.50%) 9.31%	(10.86%) 10.92%		13%
2nd	9.21%	11%	8.83%	11.42%	4/1/89-9/30/89 Avg. 11.01% or 11+4%=15% to be Eff. 1/1/90-6/30/90	
3rd	8.89%	11%	8.03%	10.67%		15%
4th	8.62%	10%	7.84%	10.50%	10/1/89-3/31/90 Avg. 10.29% or 10+4%=14% to be Eff. 7/1/90-12/31/90	
1990 1st	(8.47%) 8.36%	10%	(8.37%) 8.38%	(9.99%) 10.07%		15%
2nd	8.53%	10%	8.65%	10.00%	4/1/90-9/30/90 Avg. 10.00% or 10+4%=14% to be Eff. 1/1/91-6/30/91	
3rd	8.52%	10%	8.43%	10.00%		14%
4th	8.48%	10%	8.03%	9.90%	10/1/90-3/31/91 Avg. 9.58% or 10+4%=14% to be Eff. 7/1/91-12/31/91	
1991 1st	(7.94%) 8.50%	10%	(7.37%) 7.65%	(8.45%) 9.25%		14%
2nd	8.26%	9%	7.78%	8.67%	4/1/91-9/30/91 Avg. = 8.54% or 9+4%=13% to be Eff. 1/1/92-6/30/92	
3rd	7.91%	9%	7.49%	8.40%		14%
4th	7.12%	9%	6.56%	7.58%	n/a	
1992 1st	(6.62%) 6.71%	8%	6.59%	(6.76%) 6.50%		13%
2nd	6.20%	7%	6.65%	6.50%	n/a	

*4/28/92 is the date that Trail Mountain deposited $5,715,354.87 into a suspense account to tol the accrual of interest until final amount owed was determined through litigation.

OPPOSITION

BRIEF

No. 96-775

Supreme Court, U.S.
FILED
JAN 7 1997
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

TRAIL MOUNTAIN COAL COMPANY

Petitioner,

v.

THE UTAH DIVISION OF STATE LANDS AND FORESTRY; RALPH MILES, DIRECTOR OF THE DIVISION OF STATE LANDS AND FORESTRY; THE UTAH DEPARTMENT OF NATURAL RESOURCES; DEE HANSEN, EXECUTIVE DIRECTOR OF THE UTAH DEPARTMENT OF NATURAL RESOURCES,

Respondents.

Petition for Writ of Certiorari from the
Supreme Court of the State of Utah

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Trail Mountain Coal Company underpaid royalties on coal mined from state school trust lands pursuant to a 1965 coal lease. The coal lease expressly provided that it was subject to the laws of Utah and to future regulations that might be enacted by the State. In 1982, at a time of historically high interest rates, the State enacted regulations providing for an 18% interest rate (since reduced) on unpaid mineral royalties, to be applied prospectively. The Utah Supreme Court held that the coal lease was not impaired by the application of regulatory interest rates, because the parties had contractually agreed that the lease would incorporate future statutes and regulations. The question presented is whether, under these circumstances, Utah's prospective application of administrative interest rates to unpaid mineral royalties was violative of the Contract Clause.

PARTIES TO THE PROCEEDINGS

In the interval since this case was briefed to the Utah Supreme Court, the Utah School and Institutional Trust Lands Administration, an independent state agency, and its Director, David T. Terry, have succeeded by statute to the interests and obligations in this action of respondents Utah Division of State Lands & Forestry; Ralph Miles, Director of the Division of State Lands & Forestry; Utah Department of Natural Resources; and Dee Hansen, Executive Director of the Utah Department of Natural Resources. *See Utah Code Ann.* § 53C-1-303(3), (4).

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari filed in this proceeding by petitioner Trail Mountain Coal Company.

OPINIONS BELOW

The opinion of the Utah Supreme Court from which Trail Mountain seeks review is reported at 921 P.2d 1365 (Utah 1996).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

1. Constitutional Provisions.

Article I, Section 10, Clause 1 of the United States Constitution provides, in pertinent part:

> No State shall * * * pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts * * *.

Article I, §18 of the Utah Constitution similarly provides:

> No * * * law impairing the obligation of contracts shall be passed.

2. State Statutes.

At all relevant times,[1] *Utah Code Ann.* §§ 65-1-23 and -97 (1953) provided:

> Except as otherwise provided by law, the State Land Board shall by rules and regulations prescribe the form of application, the form of lease, the annual rental, the amount of royalty and the basis upon which the royalty shall be computed, and such other details as it may deem necessary in the interest of the state.

and

> The State Land Board may make and enforce rules and regulations not inconsistent with the provisions of this act for carrying the same into effect.

Utah Code Ann. § 65-1-98 (1953) provided:

> This Act shall prevail over all existing statutes in conflict therewith, to the extent of such inconsistency.

The statute relied upon by Petitioner Trail Mountain, *Utah Code Ann.* § 15-1-1 (1953), provided:

---

1 The statutes in Title 65 of the Utah Code Annotated cited herein were repealed in a general recodification of Utah statutes governing state land management in 1988, after the periods relevant to this proceeding. Current statutes governing state land management are found in Title 53C of the Utah Code Annotated.

(1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.

(2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 6% per annum.

3. State Regulations.

The Rules and Regulations of the Utah Board of State Lands & Forestry and the Utah Division of State Lands and Forestry in dispute in this proceeding provide in pertinent part:

Rule 3(C)(2) (Revised Effective November 4, 1982)

> An overdue royalty fee of 1.5% per month shall be charged on any amounts of production royalty which are owing the State and have not been paid within the time limit specified in the mineral lease under which such production royalty is due.

Rule 3(C)(2) (Revised Effective December 26, 1983)

> Payment of a 6% penalty fee shall be required of lessee on all delinquent royalties. In addition, lessee shall be required to pay lessor interest fees of 1.5% per month on all amounts of outstanding overdue royalty.

Rule M3a2(5)(f) (Revised Effective July 1, 1986)

> Interest shall be compounded semiannually based on the average adjusted prime rate, rounded to the nearest full percent, for each six-

month period computed from April to September and October to March (as published by the Internal Revenue Service), plus four percent (4%). The interest rate will be applied to any delinquent royalty and will be in effect until payment is received.

STATEMENT OF THE CASE

1. The State Coal Lease

Petitioner Trail Mountain Coal Company ("Trail Mountain") leased state school trust lands[2] in Emery County, Utah for the production of coal pursuant to state coal lease ML 22603 (the "coal lease"). The coal lease was originally entered in 1965 between Trail Mountain's predecessor, Malcolm McKinnon, and the State of Utah, acting through its State Land Board.

The coal lease required Trail Mountain to pay royalties to the State at the rate of 15 cents per ton of coal mined from the lease, or at the rate prevailing at the time of production for federal lessees of similar coal lands, whichever was higher. Pet. App. A at 2a-3a.

The coal lease, a two page document, contains no provisions concerning the lessee's liability for interest on delinquent royalties. Resp. App. A. When the coal lease was issued in 1965, Utah law

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2 In common with many western states, Utah was granted certain federal lands by Congress at statehood for the support of the state's common schools. Utah Enabling Act, Act of July 16, 1894, ch. 138, 28 Stat. 107. The State has an irrevocable duty, imposed by federal law, to manage these trust lands for the sole benefit of the common schools and to receive "full value" from any disposition of its school trust lands. *Lassen v. Arizona ex rel Arizona Highway Dep't*, 385 U.S. 458, 466, 87 S. Ct. 584, 588, 17 L. Ed. 2d 515 (1967).

provided that, unless the parties to a lawful contract specified otherwise, the legal rate of interest for the forbearance of money was to be 6%. *Utah Code Ann.* § 15-1-1 (1953). The coal lease went on to provide that it was expressly granted "subject in all respects to and under the conditions of the laws of the State of Utah and existing rules and regulations and such operating rules and regulations as may be hereafter approved and adopted by the State Land Board." Resp. App. A (Emphasis added). State statutes in effect at the time the lease was issued and all relevant periods thereafter gave the State Land Board plenary authority to enact rules and regulations concerning state mineral leases "as it may deem necessary in the interest of the state." *Utah Code Ann.* § 65-1-23 (1953). Utah law further provided that statutes governing state lands were to "prevail over all existing statutes in conflict therewith, to the extent of such inconsistency." *Utah Code Ann.* § 65-1-98 (1953).

2. The Royalty Audit.

In 1984 and 1985, the state agency then responsible for management of state school trust lands, respondent Utah Division of State Lands & Forestry (the "Division"), audited Trail Mountain's production of coal from the coal lease for the period of 1979 through 1984. The Division's audit found that Trail Mountain had been paying royalties to the State on the basis of the lower lease rate of 15¢ per ton, while paying royalties to the federal government on federal coal leases within the same mine at a rate of 8% of the value of the coal. Pet. App. A at 3a, n. 4. The Division determined that, with the enactment of the Federal Coal Leasing Amendments Act, Pub. L. No. 94-377, 90 Stat. 1083 (1976), *codified at* 30 U.S.C. §§ 201-09, and associated regulations, the prevailing federal coal royalty rate was 8 percent of the value of the coal removed from the lease. *See* 43 C.F.R. § 3473.3-2(a)(3)(1979). Discovery subsequently disclosed that Trail Mountain had in fact been reimbursed by purchasers of state coal for royalties based upon the 8% rate, while paying the State the lower 15¢/ton royalty.

During the 1979-1984 audit period, Trail Mountain mined 2,002,188.33 tons of state coal from the coal lease, and was paid $49,072,713.56 for the coal (including purchaser reimbursements for royalties at 8%). Out of the more than $49 million it was paid for state coal, Trail Mountain originally paid $294,201.53 to the State, based upon the lower 15¢/ton rate. The Division's audit concluded that Trail Mountain should have instead paid royalties based upon the prevailing federal rate of 8% of value, and on October 15, 1985 the State assessed Trail Mountain an additional $3,351,474.75 in royalties. Pet. App. A at 4a.

More importantly for the purposes of this petition, the Division assessed Trail Mountain for $1,854,115.69 in interest and $16,606.76 in penalties in connection with the underpaid royalties. For periods prior to December 1, 1982, the Division calculated interest using the 6% prejudgment interest rate set by *Utah Code Ann.* § 15-1-1. For periods after December 1, 1982, the Division calculated interest in accordance with the regulations that are the subject of this petition. Pet. App. A at 4a. On November 4, 1982 the Utah Board of State Lands & Forestry (the "Board") had enacted a regulation imposing a late payment fee of 1.5% per month on delinquent royalties. The Division applied this regulation to calculate interest from December 1, 1982 through the date of the audit notice, October 15, 1996.[3] The $16,606.76 penalty was imposed pursuant to a second regulation enacted by the Board on December 4, 1983. *Id.*

3. The State Litigation.

After an unsuccessful administrative appeal, Trail Mountain sought a judicial declaration that the Division had wrongly applied

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3 In 1986, the Board of State Lands & Forestry modified its regulations governing interest on delinquent royalties to provide for a floating rate based upon the prime rate plus 4%. This regulation is codified in its present version at Utah Administrative Code R850-5-300 (1996).

the 8% lease royalty rate, and that the Division was in any event estopped from collecting the higher rate. The state district court initially granted Trail Mountain's motion for summary judgment, but was reversed and remanded by the Utah Supreme Court in a consolidated appeal involving Trail Mountain and three other coal companies. *Plateau Mining Co. v. Division of State Lands & Forestry*, 802 P. 2d 720 (Utah 1990). Upon remand, the trial court ruled that the Division had properly concluded that the prevailing federal royalty rate of 8% was applicable to Trail Mountain's production from the state coal lease, and entered judgment against Trail Mountain on the Division's counterclaim for underpaid royalties. Pet. App. A at 5a. However, the trial court awarded prejudgment interest on the underpaid royalties only at the 6% statutory rate, refusing to apply the regulatory rates enacted by the Board in 1982. *Id.*

Trail Mountain appealed its liability for the underlying royalties, and the State cross-appealed, contending that the trial court should in fact have applied the regulatory interest rate to applicable portions of the audit period. The Utah Court of Appeals affirmed the trial court's determination that Trail Mountain had wrongly failed to pay royalties at the prevailing federal rate of 8%, likewise affirmed the application of the 6% statutory interest rate rather than the Board-set rate, and ruled on several other issues not relevant here. *Trail Mountain Coal Company v. Division of State Lands & Forestry*, 892 P. 2d 13 (Utah App. 1995); Pet. App. B.

4. The Utah Supreme Court Decision

Upon petition by both Trail Mountain and the State, the Utah Supreme Court accepted certiorari to resolve the dispute over

prejudgment interest.[4] In *Trail Mountain Coal Company v. Utah Division of State Lands & Forestry*, 921 P. 2d 1365 (1996), the Utah Supreme Court reversed the Utah Court of Appeals, and held that the regulatory interest rate adopted by the Board in 1982 had superseded the statutory rate in effect prior to the enactment of the regulations. Pet. App. A at 10a. The court remanded the case to the trial court with instructions to assess interest and penalties in accordance with the Board's regulations for the periods during which those regulations were applicable. *Id.*

In addressing Trail Mountain's Contract Clause arguments, the Utah Supreme Court relied heavily upon a recent decision of the court involving the identical lease form and regulations in dispute here. In *Consolidation Coal Company v. Utah Division of State Lands & Forestry*, 886 P.2d 514 (1994), the Utah Supreme Court upheld the validity of the disputed interest regulations against a coal lessee's challenge that the Utah Board of State Lands and Forestry had exceeded its authority in enacting the regulations. Pet. App. E. The *Consolidation Coal* court first noted that Utah statutes granted the Board broad discretionary authority over state school trust lands, including the statutory authority to regulate mineral leases "as [the Board] may deem necessary in the interest of the State." Pet. App. E at 64a. The Utah court noted that its prior case law was clear that the Utah legislature intended to give the Board "particularly wide discretion" in the area of state lands. Id, *citing McKnight v. State*

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4 Trail Mountain's petition for certiorari to the Utah Supreme Court did not raise the issue of its' liability for the principal amount of underpaid royalties, leaving the Utah Court of Appeals' ruling against Trail Mountain on that issue intact. Although Trail Mountain has here succumbed at several points to the temptation to reargue the merits, see e.g. Petition at 3-4, the Utah Court of Appeals conclusively determined that the coal lease clearly and unambiguously required Trail Mountain to pay royalties at the 8% federal rate. *See also* Pet. App. E at 48a-57a (rejecting lessee estoppel and lease interpretation arguments in related case).

Land Board, 14 Utah 2d 238, 381 P. 2d 726, 731 (Utah 1963). The court concluded that the disputed interest and penalty regulations were reasonably necessary and well within its statutory authority. *Id.*

In upholding the disputed interest rate regulations, the *Consolidation Coal* court also looked to state and federal law governing school trust lands. Recognizing the State's duty to manage these lands as a trustee for the benefit of the common schools, *Lassen v. Arizona ex rel Arizona Highway Dept.* 385 U.S. 458, 466, 87 S. Ct. 584, 588, 17 L. Ed. 2d. 515 (1967); *Kadish v. Arizona State Land Dept.*, 155 Ariz. 484, 497, 797 P. 2d 1183, 1196 (1987), *aff'd* 490 U.S. 605, 109 S. Ct. 2037, 104 L. Ed. 2d 696 (1989), the court found that the disputed regulations served the purposes of the school trust in two significant ways. Pet. App. E at 61a-65a. First, consistently with the State's constitutional duty to profitably manage trust lands, the regulations encouraged the proper and timely payment of royalties on mineral production from state trust lands. [5] More importantly, the interest regulations ensured that the State received full value for coal produced by trust lands, by setting interest rates that reflected the true value of royalties withheld by the coal lessee. *Id.* at 65a. The Utah court thus concluded that the imposition of interest and penalties was a proper exercise of the Board's authority over school trust lands. *Id.*

In *Trail Mountain*, the Utah Supreme Court noted that, although the court had not directly addressed the Contract Clause issue in *Consolidation Coal*, it had ruled upon a fundamental predicate of any Contract Clause claim -- whether the disputed regulations had in fact impaired or changed the terms of the lease. Pet. App. A at 8a. The court pointed out that the coal leases in

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5 In this regard, the court noted that under Utah law, it is constitutional and permissible for regulatory agencies to impose civil penalties. Pet App. D at 65a, n. 21, *citing Chris & Dick's Lumber & Hardware v. Tax Comm'n*, 791 P. 2d 511, 513-16 (Utah 1990); *Thomas J. Peck & Sons, Inc. v. Public Service Comm'n.*, 700 P. 2d 1119, 1123 (Utah 1985).

question in both cases contained provisions making them expressly subject to the laws of Utah and to future regulations enacted by the Board. The Board's promulgation of interest rate regulations, and the Division's enforcement of those regulations, were actions taken in accordance with an express contractual right, and hence no contractual term of the coal lease was impaired. *Id.*

The *Trail Mountain* court went on to distinguish *General Motors Corp. v. Romein*, 503 U.S. 181, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992), relied upon by Trail Mountain. The Utah court reiterated the *Romein* Court's observations that "state laws are implied into private contracts regardless of the assent of the parties only when those laws affect the validity, construction and enforcement of contracts" and that the Contract Clause does not "protect against all changes in legislation, regardless of the effect of those changes on bargained for agreements." Pet. App. A. at 9a-10a, *citing Romein*, 503 U.S. at 189-90.

The Utah court then noted that the disputed regulations simply affected the calculation of a contractual remedy, without affecting the availability of that remedy. *Id.* at 10a. Parties to a contract, as a matter of public policy, are not entitled to assume that one particular rate of prejudgment interest will apply, or one particular legal provision governing its assessment will triumph over another. *Id.* So long as adjustments in the interest rate were not unreasonably punitive, the regulations would not convert a previously enforceable contract into a "mere promise", the touchstone for Contract Clause analysis under *Romein*. *Id.* The Utah Supreme Court accordingly held that Trail Mountain's Contract Clause argument failed, and remanded the case to the trial court with instructions to assess interest and penalties in accordance with Board-promulgated interest and

penalties for the period during which they were applicable.[6] *Id.* Trail Mountain's petition to this Court followed.

REASONS FOR DENYING REVIEW

I. SUMMARY OF ARGUMENTS.

Trail Mountain's petition should be denied for four reasons:

(1) The Utah Supreme Court correctly concluded that no contractual term of the coal lease was impaired by the Board's enactment of regulations applying an 18% interest rate to delinquent royalty payments. The coal lease is silent on the issue of interest payable upon default, but expressly provides that it is subject to the laws of Utah and to future regulations enacted by the State. State statutes in effect when the lease was executed gave the Board broad regulatory authority. The parties to the lease contemplated that future conditions not specifically addressed in the lease could be the subject of regulation by the State, and the Utah court held that enactment and enforcement of disputed regulations was within the State's contractual rights. Trail Mountain's reliance upon *General Motors v. Romein*, 503 U.S. 181, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992)("*Romein*"), is misplaced in this situation. Because Trail Mountain's obligations under the coal lease were contractually subject to alteration by reasonable state regulation, the state regulations do not violate the Contract Clause. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412, 103 S. Ct. 697, 705, 74 L. Ed. 2d 569 (1983) ("*Energy Reserves*").

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6 This language in the Utah court's holding makes it clear that the new rates were not to be applied retroactively, as Trail Mountain claims. As was the case with the Division's original assessment of interest, the new rates were applied prospectively after their enactment; the statutory 6% rate was applied at all times prior to the enactment of the disputed regulations.

(2) The Contract Clause is not implicated in the case of a prospective modification of state law, even if that modification might otherwise be deemed an impairment of contract. Trail Mountain repeatedly states that the State of Utah retroactively modified Trail Mountain's obligation under the coal lease. In fact, the Division applied the disputed regulations only prospectively. Trail Mountain underpaid royalties beginning in 1979, but the Division applied the regulatory rates only after the effective date of the disputed regulations. Trail Mountain had no protectible reliance interests that were harmed by the State's action. It was previously receiving a windfall in the form of below-market interest on its delinquency, and in any event it had an absolute opportunity to avoid the impact of the higher interest rates on delinquent royalties by paying the State the correct amount of royalties owed under the coal lease.

(3) The disputed regulations constitute a reasonable effort by the State to protect a significant and legitimate public interest. *Energy Reserves*, 459 U.S. at 411-12, 103 S.Ct. at 704-5. At the time the coal lease was entered in 1965, interest rates were low and stable. With the systemic rise in interest rates and inflation in the 1970s and early 1980s, the Division found itself at an unforseen disadvantage, with lessees of older state mineral leases receiving an interest windfall from withholding rather than paying lease royalties. Had the regulations not been adopted, lessees would have continued to have a strong incentive to refuse to pay royalties until the State obtained final judgment, then pay the royalties plus interest at the below-market 6% statutory rate, and bank the excess interest earned in the interim. The elimination of unforseen windfall profits is a legitimate justification for the statutory impairment of contracts, *United States Trust Co. v. New Jersey*, 431 U.S. 1, 31, 97 S. Ct. 1505, 1522, 52 L. Ed. 2d 92 (1977)("*United States Trust Co.*"), just as laws imposing unforseen advantages upon a contracting party have no constitutional immunity against change. *City of El Paso v. Simmons*, 379 U.S. 497, 515, 85 S. Ct. 577, 587 (1965)("*City of El Paso*"). The State has an unquestioned obligation, imposed upon it by the Utah Enabling Act and the decisions of this court, to receive full value from state school trust lands for the benefit of Utah's common schools. The Division's

reasonable actions to ensure payment of delinquent royalties to the Permanent School Fund are not violative of the Contract Clause.

(4) This commercial dispute hinges upon the interpretation of a state mineral lease and state statutory law, rather than upon constitutional issues. The Utah Supreme Court held that Trail Mountain's coal lease expressly incorporated future state law and regulation, and that the regulations in question were reasonable and validly enacted. With the determination that the contract incorporates reasonable future regulation, there is no Contract Clause issue. Notwithstanding Trail Mountain's lofty protestations, this case simply does not rise to the level justifying review by this Court.

II. THE COAL LEASE EXPRESSLY SUBJECTS TRAIL MOUNTAIN TO REASONABLE FUTURE REGULATION OF THE TYPE IN DISPUTE HERE, AND THUS DOES NOT IMPAIR THE OBLIGATION OF CONTRACTS.

A. Nature of Contract Clause Review.

The Supreme Court has elucidated clear standards for determining when a state statute has violated the Contract Clause's prohibition against state laws "impairing the Obligation of Contracts." The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S. Ct. 2716, 2722, 57 L. Ed. 2d 727 (1978)("*Allied Structural Steel*"). The severity of the impairment increases the level of scrutiny, *Allied Structural Steel*, 438 U.S. at 245, 98 S. Ct. at 2723, but state regulation that restricts a party to the gains it reasonably expected from a contract does not constitute a substantial impairment. *Energy Reserves*, 459 U.S. at 411, 103 S. Ct. at 704; *City of El Paso*, 379 U.S. at 515, 85 S. Ct. at 587. The regulated status of the industry in question is also relevant; the foreseeability of regulation may render impairment less substantial. *Energy Reserves*; *Veix v. Sixth Ward*

Bldg. & Loan Ass'n., 310 U.S. 32, 38, 60 S. Ct. 792, 794-795, 84 L. Ed. 1061 (1940)("*Veix*").

Even if a state law does substantially impair contractual obligations, it may still be upheld against a Contract Clause challenge if the statute has a "significant and legitimate" public purpose. *United States Trust Co.*, 431 U.S. at 22, 97 S. Ct. at 1517. Upon identification of such a public purpose, the next inquiry is whether the adjustment of the rights and responsibilities of the contracting parties is reasonable and appropriate in light of the identified public purpose. *Energy Reserves*, 459 U.S. at 412, 103 S. Ct. at 705; *United States Trust Co.*, 431 U.S. at 22, 97 U.S. at 1517.

B. The Utah Supreme Court Correctly Determined That There Was No Impairment of Contract.

Petitioner Trail Mountain's argument is simple. The two page coal lease is silent concerning the interest rate to be charged upon the lessee's default in the payment of royalties. At the time that the coal lease was entered in 1965, the Utah prejudgment interest statute provided for a 6% rate for the forbearance of money in those situations where the parties to a lawful contract had not specified a rate. *Utah Code Ann.* § 15-1-1 (1953). By regulation in 1982, the State imposed a higher interest rate on delinquent royalties, which has resulted in Trail Mountain having to pay more in interest than it otherwise would have for wrongfully failing to pay royalties in accordance with the lease. Trail Mountain concludes *ipso facto* that having to pay more interest upon default must be an impairment of the contract, and violative of the Contract Clause.

Trail Mountain ignores the primary rationale for the Utah Supreme Court's conclusion in *Trail Mountain* and *Consolidation Coal* that the disputed regulations do not impair the obligation of contract -- that the coal lease and contemporaneous statutes expressly granted the State Land Board broad power to enact regulations governing state mineral leases. In *Consolidation Coal* (upon which the Utah court's decision in this case was based), the court noted that

Utah law in effect at the time the coal lease was executed granted the Board specific authority to enact regulations governing mineral leases "in such ... details as it may deem necessary in the interest of the State." *Utah Code Ann.* §65-1-23(1953). Utah case law at the time was equally clear on the issue:

> The Land Board has full power and authority to prescribe necessary and proper rules and regulations to accomplish its purposes and objectives as set out by statute.... The provisions of the [act governing state lands] clearly indicate that the Legislature had in mind the distinction between a positive mandate to the Board and a permissive right to take certain actions in its discretion.

McKnight v. State Land Board, 14 Utah 2d 238, 381 P. 2d 726, 731 (Utah 1963).

In addressing Trail Mountain's Contract Clause claim, the Utah Supreme Court looked not only to the Board's broad authority to enact regulations governing activities on state lands, but to the language of the coal lease itself. The coal lease not only expressly incorporates present and future Utah statutes, but also provides that the lease will be subject to future regulations that might be enacted by the Board in connection with operations under the lease. Resp. App. A. The *Trail Mountain* court looked to this language to conclude that the State had a contractual right to modify the coal lease through subsequent regulation, and that the disputed interest and penalty regulations fell within this right. Pet. App. A at 8a.

The Utah Supreme Court essentially held that there was no impairment of contract, substantial or not, because the contract itself permitted the State to act as it did. The Utah court's conclusion on this threshold issue is based upon a reasonable interpretation of the contract and state law, and should not be overturned by this Court.

C. *General Motors v. Romein* is Irrelevant On These Facts.

i. The *Romein* Decision Permitted Retroactive Legislation So Long As That Legislation Was Not "Central" to the Enforceability of Contract.

Trail Mountain relies most heavily upon *Romein* for its core contention that the 6% statutory prejudgment interest rate in effect in 1965 was immutably incorporated into the coal lease. In *Romein*, the Supreme Court addressed a Michigan workmen's compensation statute allowing employers to reduce benefits to injured workers with certain supplemental income. The benefit reduction statute had been passed in 1981, but retroactively repealed by the Michigan legislature in 1987, requiring plaintiff employers who had reduced benefits in reliance upon the statute to refund nearly $25 million to the employees. The employers argued that the 1981 statute had impliedly been incorporated into their collective employment contracts, and invoked the Contract Clause to prevent the retroactive change of the 1981 statute.

The Supreme Court unanimously rejected the employers' Contract Clause claims because it found that the benefits reduction law was not incorporated in the employment contracts. 503 U.S. at 188-9, 112 S. Ct. at 1110-11. The Court held that Michigan law did not imply the benefits reduction law as a term of employment contracts, and that the right to reduce benefits was not central to the bargained-for exchange between the parties, or to the enforceability of the contract as a whole. *Id.* Because the retroactive 1987 law did not "change the legal enforceability" of the employment contracts, it did not implicate the Contract Clause. 503 U.S. at 190, 112 S. Ct. at 111.

Notwithstanding *Romein*'s rejection of a Contract Clause challenge on the basis that the statute in question was not "central" to enforceability of the contract, Trail Mountain asserts that the specific rate of prejudgment interest that it believes was incorporated in the coal lease is so central to the enforceability of the coal lease that the Utah Supreme Court has "baldly evaded" *Romein*. Pet. at 15. This

argument was properly rejected by the Utah Supreme Court, as discussed further in subsection (iii) below. But Trail Mountain's reliance on *Romein* is misplaced for a more obvious reason: because future Board regulation was expressly contemplated by the parties and permitted by the coal lease, even if the statutory rate was originally incorporated in the coal lease,[7] it was contractually superseded by the Board's interest rate regulations.

ii. *Romein* Is Inapplicable Because the Disputed Regulations Were Contractually Permissible and In Accordance With the Lessee's Reasonable Expectations of State Regulation.

In *Romein*, the contract was silent about the incorporation of the disputed provision of state law, and the Supreme Court's analysis hinged upon whether the provision had been incorporated in the contract. In contrast, even assuming *arguendo* that the 6% statutory rate applicable under *Utah Code Ann.* § 15-1-1 (1953) was incorporated in the coal lease in 1965, the issue here is whether the parties agreed in the coal lease to future Board regulations such as those in dispute here, contractually superseding the incorporated statutory rate. The Utah Supreme Court held as a matter of contractual interpretation that the parties had done so, and there is no reason to disturb that finding. *Romein* is irrelevant under the circumstances.

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7 In *Consolidation Coal*, Chief Justice Zimmermann of the Utah Supreme Court questioned whether, by its terms, *Utah Code Ann.* §15-1-1 even applies to a contract for the sale of mineral rights, because the statutory language seems to apply only to loans or forbearances of money. Pet. App. E at 59a, n. 13. The Court did not reach this issue because the State had failed to raise it. *Id.* If, as a matter of statutory construction, §15-1-1 was not applicable to the coal lease, then Trail Mountain's entire claim is negated, because there would by definition be no incorporated interest rate.

Rather than *Romein*, this case is far more similar to this Court's Contract Clause cases involving regulated industries. In *Veix*, and continuing with *Energy Reserves*, the Supreme Court held that participants in previously regulated industries have lesser expectation that their contracts will remain unimpaired by future legislation, rendering it less likely that such legislation will be deemed a substantial impairment violative of the Contract Clause. *Energy Reserves*, 459 U.S. at 411, 103 S. Ct. at 704 (reasonably foreseeable future regulation does not constitute substantial impairment); *Veix*, 310 U. S. at 38, 60 S. Ct. at 794-795(those buying into regulated industries take the risk of future legislation). In this case, the statutory regime governing the management and leasing of state lands at the time the coal lease was entered gave the State Land Board broad authority to enact regulations as it deemed necessary in the interest of the state. *Utah Code Ann.* § 65-1-23(1953). In fact, Utah law at the time expressly provided that all state statutes inconsistent with those governing state lands were to be deemed superseded to the extent of the inconsistency. *Utah Code Ann.* § 65-1-98 (1953). When taken with the contract language expressly allowing future regulation, these statutes make it clear that Trail Mountain could reasonably foresee future regulation of the nature at issue here. Just as in *Energy Reserves*, the reasonable and foreseeable state regulation here did not substantially impair Trail Mountain's contractual rights or obligations.

iii. The Utah Supreme Court Properly Distinguished *Romein*.

Trail Mountain attacks the Utah Supreme Court for allegedly having misinterpreted *Romein*, Pet. at 14, but upon closer inspection the Utah court's reasoning and holding are in accordance with *Romein* and other applicable precedents. The *Romein* court based its holding upon the fact that the 1987 repealer did not change the legal enforceability of the employment contracts, and that the parties still had the same ability to enforce the bargained-for terms of the contracts as they did before the 1987 statute was passed. 503 U.S. at 190, 112 S. Ct. at 1111.

Applying this principle to the Trail Mountain facts, the Utah court noted that the coal lease remained entirely enforceable according to its terms notwithstanding the change in interest rates to be applied upon default. "Adjustments in the interest rate, so long as they are not unreasonably punitive, do not 'convert an agreement enforceable at law into a mere promise'; nor do they 'impair the obligation of pre-existing contracts.'" Pet. App. A at 10a. This conclusion was based upon a finding that parties to a contract would have no reasonable expectation of a particular interest rate applying in the future, so long as interest is available in a reasonable form and under appropriate circumstances. *Id.*

This analysis is directly comparable to statements by the Court in *United States Trust Company*. The Court there noted that the remedy/rights distinction (discussed in dicta by the Utah court) parallels the inquiry into the legitimate expectations of the contracting parties:

> The parties may rely on the continued existence of adequate statutory remedies for enforcing their agreement, but they are unlikely to expect that state law will remain entirely static. Thus, a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement.

431 U.S. at 19, n. 16, 97 S. Ct. at 1516, n. 16. The Utah Supreme Court focused on the proper issue: whether under the circumstances a change in the prejudgment interest rate upset the reasonable expectations of the parties. Its' conclusion that *Romein* did not invalidate the regulations was correct.

III. THE DISPUTED REGULATIONS WERE NOT APPLIED RETROACTIVELY.

Trail Mountain repeatedly characterizes the disputed regulations as having been enacted and applied retroactively. This

contention is misleading at best. The initial interest rate regulations were enacted by the Board in early November, 1982, but were not applied to Trail Mountain's outstanding delinquent balance until the following month. Pet. App. A at 4a. When the interest rate regulations were modified to provide for a floating rate in 1986, this change was again applied only prospectively to Trail Mountain's delinquent royalty. *Id.*

It is instructive to compare the factual situation here to that in *In re Workers' Compensation Refund*, 46 F. 3d 813 (8th Cir. 1995)("*Workers' Compensation*"), relied upon heavily by Trail Mountain to support its retroactivity claims. See Pet. at 21-22. In *Workers' Compensation*, a reinsurance pool for workers' compensation insurers used conservative actuarial assumptions, and accumulated a $402 million surplus between 1979 and 1992, some of which had already been refunded to its insurance company members. In 1993, the Minnesota legislature enacted a statute that would have retroactively redistributed the entire 1979-1992 surplus (including that which had already been refunded) to employers who had paid premiums during the period.

In defending the retroactive legislation, Minnesota pointed to a contractual provision automatically subjecting the insurance plans to future state law and regulation, and argued that this automatic amendment language precluded a finding of contractual impairment for Contract Clause purposes. 46 F. 3d at 818-9. The *Workers' Compensation* court found this argument unconvincing because of the unquestionably retroactive nature of the amendment, but expressly distinguished situations where an amendment was applied prospectively to an existing contract, and thus would not affect settled plans. Legislation of this nature would not be subject to Contract Clause attack. *Id.*

Workers' Compensation is thus factually distinguishable. The interest rate regulations in dispute here were not applied to delinquent royalties retroactively, but rather only after the regulations' enactment. For all periods prior to November, 1982, interest was

calculated at the 6% rate set by statute. Trail Mountain cannot be said to have had settled expectations in being able to obtain a 6% rate on unaccrued interest on delinquencies, where market rates had risen far higher in the years since the coal lease was executed. *See City of El Paso*, 379 U.S. at 515, 85 S. Ct. at 587 ("This Court's decisions have never given a law which imposes unforseen advantages on a contracting party constitutional immunity against change.").

It is difficult to find sympathy for Trail Mountain in this situation. The great majority of the disputed interest accrued not within the period between November 30, 1982 and the September 1985 audit notice,[8] but rather in the eleven years since then that Trail Mountain has been pursuing an unremitting litigation strategy to avoid paying the school trust anything. Indeed, Trail Mountain's actions validate the reason for the Board's interest rules. Trail Mountain seeks the loan of unpaid royalties since 1979 at 6% simple interest, a period during which market rates were generally considerably higher. If it prevails, lessees of pre-1982 state mineral leases -- many of which are still in effect and will remain so for decades until all production ceases -- will be entitled to 6% rates on any delinquency no matter what market rates do. This would create a strong financial incentive for such lessees to do just what Trail Mountain has done --- refuse to pay royalties until forced to do so by final judgment after every appeal is exhausted.

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8 Trail Mountain presumably will argue that it did not know it owed delinquent royalties until the audit in 1985, and so should not have the higher interest rate applied to it for the 1982-1985 period. This claim disregards the Utah courts' undisputed findings that the subject coal leases were unambiguous and that the lessees knew or should have known from the beginning of their obligation to pay royalties at the higher 8% rate. Pet App. B at 19a-20a; D at 54a-57a.

IV. THE BOARD'S INTEREST AND PENALTY REGULATIONS WERE REASONABLE AND SERVED THE LEGITIMATE PUBLIC PURPOSE OF PROTECTING THE SCHOOL TRUST FROM THE INTENTIONAL DEFAULTS OF ITS MINERAL LESSEES.

A. The Utah Supreme Court's Attention to the School Trust Was Appropriate and In Accordance With the Decisions of this Court.

Even if a state statute substantially and retroactively impairs the obligation of contracts, the statute may survive a Contract Clause challenge if it serves a legitimate public purpose. *United States Trust Co.*, 431 U.S. at 22, 97 S. Ct. at 1517. Such purpose is judged generally by standards of reasonableness. 431 U.S. at 22, n. 19, 97 S. Ct. at 1518, n. 19. The contested regulations meet this test.

Utah's school trust lands were granted by Congress at statehood for the purpose of supporting the new state's common schools. Utah Enabling Act, Act of July 16, 1894, ch. 138, 28 Stat. 107. Congress' grant of the trust lands to the State of Utah was expressly accepted in the Utah Constitution, thereby creating a compact between the federal and state governments, and imposing upon those governments a trust obligation toward the beneficiary institutions. This compact is a "solemn agreement", contractual in nature, between the United States and the State of Utah. *Andrus v. Utah*, 446 U.S. 500, 100 S.Ct. 1803, 64 L. Ed. 458 (1980).

The decisions of this Court, and of the Utah Supreme Court, have consistently held that state agencies are obligated by federal and state law to manage these trust lands as a fiduciary for the sole benefit of the common schools, and to receive "full value" from any disposition of such lands. *Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 466 (1967); *Plateau Mining Co v. Utah Div. of State Lands and Forestry.*, 802 P.2d 720, 729 (Utah 1990). The State may not alter or abrogate this duty, nor may it make any disposition

of the property which conflicts with this duty. *Trustees of Vincennes Univ. v. Indiana*, 55 U.S. (14 How.) 268 (1852).

At the time the disputed regulations were enacted in 1982, there had been a significant and prolonged rise in both interest rates and inflation over a period of years. As the table of rates submitted by Trail Mountain shows, various measures of market interest rates were considerably higher than the 6% statutory rate in effect prior to the Board's enactment of interest rate regulations in 1982. Pet. App. J. The Court can similarly recollect that in many of the years in question, the rate of inflation was higher than 6%, resulting in negative real returns to the school trust from collection of delinquent royalties with interest at the statutory rate. In reviewing the disputed regulations, the Utah Supreme Court in *Consolidation Coal* concluded that the regulations had at least two significant purposes: ensuring the proper and timely payment of mineral royalties to the State, and guaranteeing that the State received full value for the disposition of trust-owned minerals, by setting rates that reflected the true value of the royalties that had been withheld. Pet. App. E at 64a-65a.

Trail Mountain has no constitutional right to reap a windfall by withholding royalties and paying interest rates far below market. *United States Trust Co*, 431 U.S. at 31, n. 30, 97 S. Ct. at 1522, n. 30. In light of the State's unquestioned duty to act as a prudent trustee on behalf of its common schools, the Board's exercise of its statutory and contractual right to enact regulations imposing market-driven interest rates served a legitimate public purpose.

B. The Interest Rates Set By the Board Were and Are Reasonable Under the Circumstances.

Trail Mountain has attempted to show that the Board-imposed rates were unreasonable by appending a chart that it has created, comparing the Board rates with the return achieved by the Utah Permanent School Fund, IRS interest rates, five year treasury bond rates, and the prime rate. Pet. App. J. Trail Mountain's complaints

about the reasonableness of the rates should be dismissed with little ado.[9] A quick glance at the chart provided by Trail Mountain shows that, while high, the rates have in a number of instances since 1982 been closer to the prime rate than the 6% rate advocated by Trail Mountain. The relevance of most of the comparative rates provided by Trail Mountain is also questionable. Investment in safe instruments (as exemplified by the Permanent School Fund and U.S. treasury bonds) undoubtedly would produce lower returns than the interest rates on delinquent royalties imposed by the Board, but that is not the point. The Board could reasonably conclude that mineral lessees who were unable or unwilling to pay royalties when due were a significantly greater credit risk than the United States Treasury, and thus deserving of higher rates. More importantly, the Utah Supreme Court correctly pointed out that one purpose of the rates was to provide an incentive for timely payment of royalties; the interest rate charged upon delinquent royalties must exceed prevailing market rates if such an incentive is to exist. Under the circumstances, it cannot be said that the 18% interest rate in effect between November 1982 and 1986, and the floating rates that have been in effect since that time, are unreasonable.

C. The State's Status As A Party to the Contract Does Not Change the Result Here.

In determining whether a particular enactment has a legitimate public purpose, reviewing courts typically will defer to the state's legislative judgment as to the necessity and reasonableness of a particular measure. *United States Trust Co.*, 431 U.S. at 22-23, 97 S. Ct. at 1518. Trail Mountain correctly states that an exception to this principle may occur when the State itself is a contracting party, but this

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9 The Utah Administrative Rule Making Act provided Trail Mountain and any other lessee aggrieved by the rules with a two year window to challenge the rule as unreasonable or violative of their legal rights. *Utah Code Ann.* §§ 63-46-1 -- 13 (1953)(repealed). No such challenge was filed.

exception does not change the result here. In *United States Trust Co.*, the State of New Jersey had covenanted in 1962 to the holders of Port Authority bonds that it would not use certain reserve funds pledged as security for the bonds to subsidize passenger rail traffic. A 1974 New Jersey statute retroactively repealed this covenant. It being apparent under the circumstances that a substantial impairment of the state's obligations had occurred, New Jersey argued that its need to use the reserve fund for significant state purposes such as energy conservation should override the limitations imposed by the Contract Clause.

The Supreme Court disagreed. It initially concluded that where the state was a party, "complete deference" to a legislative finding of reasonableness and necessity was inappropriate because of the state's financial self-interest. 431 U.S. at 25-26, 97 S. Ct. at 1519. The Court accordingly chose to independently review the State's rationale that the repeal of the particular covenant was both reasonable and necessary, and found both arguments wanting under the particular circumstances before it. 431 at U.S. 30-32, 97 S. Ct. at 1521-1523.

As a threshold matter, this case does not involve a substantial impairment of the coal lease, a fact that permits the Court to avoid even reaching the reasonableness and necessity of the state's action. The applicability of *United States Trust Company* is also questionable where, as here, the state action involves modifying its own remedies against defaulting debtors, rather than the "classic" Contract Clause scenario in that case -- a state seeking to reduce its own obligations to its creditors.[10] *See also infra* n. 11. But even if the Court applies a less deferential standard of review to Utah's actions here, as *United States Trust Company* suggests, the result should remain the same. The Utah Supreme Court recognized the clear necessity of the regulations to ensure that royalties were not withheld to take advantage of high market interest rates, and to recover full value for the school trust. The rates chosen -- both the initial 18% rate and the subsequent floating rate -- were objectively reasonable under the circumstances for defaulting

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10 The *U.S. Trust Company* court recognized that its precedents had "regularly" imposed stricter standards upon state debtors. 431 U.S. at 24, 97 S. Ct. at 1519.

mineral lessees. The state's status as a contracting party does not dictate a different result in this case.

V. REVIEW IS UNNECESSARY BECAUSE SUBSTANTIAL CONSTITUTIONAL PRINCIPLES ARE NOT INVOLVED.

This case fundamentally involves the interpretation of a state mineral lease and state statutory and administrative law. The Utah Supreme Court concluded in *Consolidation Coal* that the disputed rules were permissible under state law and reasonably calculated to achieve legitimate public goals. Building upon that decision, the *Trail Mountain* court held that the coal lease expressly contemplated future regulation by the Board, and that the enactment of the disputed interest rate rules was within the contractual rights of the State. While the State recognizes the role of this Court as the ultimate arbiter of the constitutional legitimacy of the State's actions, *Romein*, 503 U.S. at 187, 112 S. Ct. at 1110, we suggest that this commercial dispute does not even approach the level warranting review by the Supreme Court.

Trail Mountain has provided the Court with a lengthy and interesting, if somewhat argumentative, synopsis of the origins and purpose of the Contract Clause. While counsel would enjoy the briefing of such historical matters,[11] it is unnecessary. Recent precedents of this Court set forth clear guidelines for determining

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11 It is generally recognized that the Contract Clause arose to thwart the "ignoble array of legislative schemes for the defeat of creditors and contractual obligations" that had arisen in the troubled financial times following the revolution. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 427, 54 S. Ct. 231, 236 (1934). On the basis of the Framers' intent, it is arguable that the state regulation here, designed to protect a creditor from having the value of his money erased by inflation, would not be governed by the Contract Clause. *See* The Supreme Court and the Contract Clause, 57 *Harvard L. Rev.* 512, 514-518 (1943)(questioning whether the Contract Clause bars legislative enlargement rather than impairment of contractual obligations).

whether a state's regulation implicates the Contract Clause. In this case, the State's actions had a legitimate public purpose, were not retroactive, and did not substantially impair Trail Mountain's coal lease. There is no Contract Clause issue here.

CONCLUSION

The decision of the Utah Supreme Court should be summarily affirmed pursuant to Sup. Ct. R. 16.1, or in the alternative the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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January 7, 1997

APPENDIX

APPENDIX A

Proof Read
MS LR

MINERAL LEASE APPLICATION MINERAL
LEASE NO. 22603
NO. 22603 GRANT:
School

Utah State Lease for

COAL

THIS INDENTURE OF LEASE AND AGREEMENT entered into in duplicate this 8th day of February, 1965, by and between the STATE LAND BOARD, acting in behalf of the State of Utah, hereinafter called the Lessor, and

MALCOLM N. McKINNON
1222 South Main Street
Salt Lake City, Utah 84101

party of the second part, hereinafter called the Lessee, under and Pursuant to Title 65, Utah Code Annotated, 1953.

WITNESSETH: That the Lessor, in consideration of the rents and royalties to be paid and the covenants to be observed by the Lessee, as hereinafter set forth, does hereby grant and lease to the Lessee the exclusive right and privilege to mine, remove, and dispose of all the said minerals in, upon, or under the following described tract of land situated in Emery County, State of Utah, to-wit:

All of Section Thirty-six (36), Township Seventeen (17) South, Range Six (6) East, Salt Lake Meridian,

containing a total of 640.00 acres, more or less, together with the right to use and occupy so much of the surface of said land as may be required for all purposes reasonably incident to the mining removal, and disposal of said minerals, according to the provisions of this lease, for the period ending ten years after the first day of January next succeeding the date hereof and as long thereafter as said minerals may be produced in commercial quantities from said lands, or Lessee shall continue to make the payments required by Article III hereof, upon condition that at the end of each twenty (20) year period succeeding the first day of the year in which this lease is issued, such readjustment of terms and conditions may be made as the Lessor may determine to be necessary in the interest of the State.

ARTICLE I

This lease is granted subject in all respects to and under the conditions of the laws of the State of Utah and existing rules and regulations and such operating rules and regulations as may be hereafter approved and adopted by the State Land Board.

ARTICLE II

This lease covers only the mining, removal, and disposal of the minerals specified in this lease, but the Lessee shall promptly notify the Lessor of the discovery of any minerals excepting those enumerated herein.

ARTICLE III

The Lessee, in consideration of the granting of the rights and privileges aforesaid, hereby covenants and agrees as follows:

FIRST: To pay to the Lessor as rental for the land covered by this lease the sum of fifty (50) cents per acre per annum. All such annual payments of rental shall be made in advance on the 2nd day of January of each year, except the 1965 rental which is payable on the execution of this lease. All rentals shall be credited against royalties for the year in which they accrue.

SECOND: To pay Lessor quarterly, on or before the 15th day of the month succeeding each quarter, royalty

(a) at the rate of 15¢ per ton of 2000 lbs. Of coal produced from the leased premises and sold or otherwise disposed of, or

(b) at the rate prevailing, at the beginning of the quarter for which payment is being made, for federal lessees of land of similar character under coal leases issued by the United States at that time, whichever is higher, and, commencing with the year beginning the January 1 following two years from the date hereof, to pay annual royalty of at least $1.00 multiplied by the numbers of acres hereby leased regardless of actual production, provided that Lessor may, at any time after the tenth anniversary date hereof, increase the minimum annual royalty by not to exceed 50%.

If the coal produced from the leased premises is washed before sale or other disposition by Lessee, Lessee may pay royalty on the washed product only, provided Lessee maintains accurate record by which the weight of washed coal originating from the leased premises can be ascertained and complies with all regulations and directives issued by Lessor to prevent waste and to insure that royalty is paid on all washed coal originating from the leased premises.

THIRD: To prepare and forward to the State Land Office, on or before the 15th day of the month next succeeding the quarter in which the material is produced, a certified statement of the amount of production of all of the leased substances disposed of from said lands, and such other additional information as the State Land Board may from time to time require.

FOURTH: To keep at the mine office clear, accurate and detailed maps on tracing cloth, on a scale not more than 50 feet to the inch, of the workings in each section of the leased lands and on the lands adjacent, said maps to be coordinated with reference to a public land corner so that they can be readily and correctly superimposed, and to furnish to the Lessor annually, or upon demand, certified copies of such maps and such written statements of operations as may be called for. All surveys shall

be made by a licensed engineer and all maps certified to by him.

FIFTH: Not to fence or otherwise make inaccessible to stock any watering place on the premises without first obtaining the written consent of Lessor, nor to permit or contribute to the pollution of any surface or subsurface water available or capable of being made available for domestic or irrigation use.

SIXTH: Not to assign this lease or any interest therein, nor sublet any portion of the leased premises, or any of the rights and privileges herein granted, without the written consent of the Lessor being first had and obtained.

ARTICLE IV

The Lessor hereby excepts and reserves from the operation of this lease:

FIRST: The right to permit for joint or several use such easement or rights-of-way upon, through, or in the land hereby leased as may be necessary or appropriate to the working of these or other lands belonging to or administered by the Lessor containing mineral deposits or for other use.

SECOND: The right to use, lease, sell, or otherwise dispose of the surface of said lands or any part thereof, under existing State laws or laws hereafter enacted, insofar as said surface is not necessary for the Lessee in the mining, removal, or disposal of the leased substances therein, and to lease mineral deposits, other than those leased hereby, which may be contained in said lands so long as the recovery of such deposits does not unreasonably interfere with Lessee's rights herein granted.

ARTICLE V

Upon failure or refusal of the Lessee to accept the readjustment of terms and conditions demanded by the Lessor at the end of any twenty year period, such failure or refusal shall work a forfeiture of the lease and the same shall be canceled.

ARTICLE VI

In case of expiration, forfeiture, surrender or other termination of this lease, all underground timbering supports, shaft linings, rails and other installations necessary for the support of underground workings of any mines, and all rails or head frames and all installations which cannot be removed without permanent injury to the premises and all construction and equipment installed underground to provide ventilation for any mines, upon or in the said lands shall be and remain a part of the realty and shall revert to the Lessor without further consideration or compensation and shall be left by the Lessee in the lands.

All personal property of Lessee located within or upon the said lands, and all buildings, machinery, equipment and tools (other than the installations to become the property of Lessor as above provided), shall be and remain the property of Lessee and Lessee shall be entitled to, and may, within six (6) months after such expiration, forfeiture, surrender or other termination of said lease, or within such extension of time as may be granted by Lessor, remove from the said lands such personal property and improvements, other than those items which are to remain the property of the Lessor as above provided.

Lessee shall, upon termination, of this lease or abandonment of the leased premise for any reason, seal to Lessor's satisfaction all or such part of the mine openings on the premises as Lessor shall request be sealed.

ARTICLE VII

It shall be the responsibility of the Lessee to slope the sides of all operations of a surface nature to an angle of not less than 45° or to erect a barrier around such operation as the State Land Board may require. Such sloping or fencing shall become a normal part of the operation of the lease so as to keep pace with such operation to the extent that such operation shall not constitute a hazard.

ARTICLE VIII

Lessee shall not sell or otherwise dispose of any water rights acquired for use upon the leased premises except with Lessor's written permission. Upon termination of this lease for any reason, all such rights acquired by application to the Utah State Engineer shall revert to the Lessor as an appurtenance to the leased premises, and all such rights

acquired by other means shall be offered to Lessor in writing for purchase at Lessee's acquisition costs, provided that Lessor shall be deemed to have rejected such offer if it does not accept the same within thirty days after receipt thereof.

ARTICLE IX

All of the terms, covenants, conditions and obligations in this lease contained, shall be binding upon the heirs, executors, administrators, and assigns of the Lessee.

ARTICLE X

Lessee may terminate this lease at any time upon giving three (3) months' notice in writing to the Lessor and upon payment of all rents and royalties and other sums due and payable to the Lessor, and upon complying with the terms of this lease with respect to the preservation of the workings in such order and condition as to permit of the continued operation of the leased premises.

ARTICLE XI

Lessor, its officers and agents, shall have the right at all times to go in and upon the leased lands and premises, during the term of said lease to inspect the work
done and the progress thereof on said lands and the products obtained therefrom, and to post any notices on the said land that it may deem fit and proper; and also shall permit any authorized representatives of the Lessor to examine all books and records pertaining to operations under this lease, and to make copies of and extracts from the same, if desired.

ARTICLE XII

This lease is issued only under such title as the State of Utah may now hold, and that in the event the State is hereafter divested of such title, the Lessor shall not be liable for any damages sustained by the Lessee, nor shall the Lessee be entited to or claim any refund of rentals or royalties or other monies theretofore paid to the Lessor.

ARTICLE XIII

If the Lessee shall initiate or establish any water right on the leased premises, such right shall become an appurtenance of the leased premises, and, upon the termination of the lease the Lessee shall convey the right to the Lessor.

IN WITNESS WHEREOF, the parties have hereunto subscribed their names the day year first above written.

STATE OF UTAH

STATE LAND BOARD
By _____
DIRECTOR

LESSOR

_____

STATE OF UTAH
COUNTY OF ss.

LESSEE'S INDIVIDUAL ACKNOWLEDGMENT

On the _____ day of _____ 19____, personally appeared before me _____ ,
the signer of the above instrument, who duly acknowledged to me that _ _____ executed the same.

Given under my hand and seal this _____ day of _____ _ 19____

My commission Expires: _____

_____
Notary Public, residing at:

STATE OF UTAH
COUNTY OF ss.

LESSEE'S CORPORATE ACKNOWLEDGMENT

On the _____ day of _____ 19____, personally appeared before me _____who being duly sworn did say that he is an officer of _____ and that said instrument was signed in behalf of said corporation by resolution of its Board of Directors, and said _____ acknowledged to me that said corporation executed the same.

Given under my hand and seal this _____ day of _____ ____ 19____

My commission Expires: _____

_____
Notary Public, residing at:

STATE OF UTAH
COUNTY OF SALT LAKE ss.

On the _____ day of _____ 19_____, personally appeared before me Max C. Gardner, who being by me duly sworn did say that he is the Director of the State Land Board of the State of Utah and that said instrument was signed in behalf of said Board by resolution of the Board, and said Max C. Gardner acknowledged to me that said Board executed the same in behalf of the State of Utah.

Given under my hand and seal this _____ day of _____ 19_____

My commission Expires: _____

_____
Notary Public, residing at:

MOTION FILED

JAN 7 1997

(4)

No. 96-775

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

TRAIL MOUNTAIN COAL COMPANY,
Petitioner,

v.

THE UTAH DIVISION OF STATE LANDS AND FORESTRY; RALPH MILES, Director of the Division of State Lands and Forestry; THE UTAH DEPARTMENT OF NATURAL RESOURCES; DEE HANSEN, Executive Director of the Utah Department of Natural Resources,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Utah

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, *amicus,* National Mining Association, respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of the brief and a copy of petitioner's written consent has been filed with the Clerk of this Court. This motion is made necessary because the respondent State of Utah has withheld consent.

Amicus, a national trade association whose members include companies that produce most of the Nation's minerals, has a strong interest in legal matters that affect

the acquisition, production and sale of minerals. This case, which involves a mineral lease entered into between the petitioner and the State of Utah, presents the question whether the Contract Clause permits a State to retroactively and substantially alter its contract rights. A vital part of the mineral resource base developed by *amicus*' members is comprised of minerals leased from the States in their proprietary capacity. Accordingly, *amicus* has a compelling interest in this question which goes to the core mission of the Contract Clause, and the limits of the government's power to alter the contractual relationships which supply the legal foundation for the mining industry's right to develop its resource base.

Because the question presented by the petition is of great importance to *amicus*' members who must do business with the States, *amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioner.

Respectfully submitted,

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---

BRIEF OF *AMICUS CURIAE* THE NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONER

INTERESTS OF THE *AMICUS CURIAE*

The National Mining Association is a trade association representing mining companies that produce most of the Nation's minerals. Its members also include other key segments of the mining industry—manufacturers of equipment, resource developers, and transporters of the products of mining.

The mining industry produces vital resources needed to fuel our economy and manufacture virtually all com-

modities sold in domestic and foreign markets. Coal is used to generate 56% of the electricity consumed on an annual basis in the United States. Mining companies produced $39 billion worth of nonfuel minerals last year, which in turn were used to manufacture $395 billion worth of products for use by Americans and for export to trading partners around the world.

The principal purpose of *Amicus* is to represent those with interests in the Nation's mineral resources industries in the important public policy issues affecting the development and use of mineral resources. Toward this end, *Amicus* seeks to develop policies that will foster the efficient production, distribution and use of mineral products. The Utah Supreme Court's disregard of the Contract Clause in construing the terms of a state mineral lease seriously undermines such policies.

ARGUMENT

REVIEW IS WARRANTED TO CLARIFY THE LIMITS OF THE GOVERNMENT'S POWER TO ALTER THE LEGAL RELATIONSHIPS THAT SUPPLY THE MINING INDUSTRY'S RIGHTS TO DEVELOP MINERAL RESOURCES.

The decision of the Supreme Court of Utah disregards this Court's longstanding precedent establishing the scope of contract terms protected from impairment under the Contract Clause of the United States Constitution (art. I, § 10, cl. 1), *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535 (1867); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *General Motors Corp. v. Romein*, 503 U.S. 181 (1992). By ignoring the longstanding principle that the state laws in existence at the time of the making of the contract indeed form part of it, the court below evaded the heightened scrutiny that follows when "the State's self-interest is at stake." *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 26 (1977).

The Supreme Court of Utah's departure from a principled approach to Contract Clause analysis raises very serious questions concerning whether the mining industry can develop its reserve base in reliance upon contractual relationships with States that provide the right to mine State-owned minerals. The resource base developed by *Amicus'* Members is comprised of minerals located on private, federal and state lands. The rights to develop these resources are obtained by location, sale, or lease, depending upon the type of minerals, ownership, and applicable state or federal laws.

The right to develop State-owned minerals is generally acquired by contract in the form of a mineral lease with the terms and conditions negotiated with the State in its proprietary capacity. Like other contracts, the material terms of a mineral lease include both the expressly bargained-for obligations and those laws in effect at the time of the agreement that affect its interpretation and enforcement. All of these material, or essential, terms formulate the basis of the parties' legitimate economic expectations under a mineral lease.

This case presents the question whether the Contract Clause permits a State lessor to upset these legitimate economic expectations by a retroactive and substantial change in terms related to the enforcement of the lease. *Amicus* submits that the approach employed by the Utah Supreme Court not only lacks constitutional foundation, but effectively allows the State to opt out of Contract Clause scrutiny for any change to state laws that affect the construction or enforcement of the State's contractual rights. This constitutionally problematic result merits the Court's attention.

In reliance on contractual relationships similar to the one here, the mining industry has committed substantial capital investments and planned existing operations to develop State-owned minerals. If other States follow the approach used below, the contracts that provide the legal

foundation for the industry's right to mine will be subject to the fluctuating policy whims of the various States. The decision below provides other States with a recipe for evasion of Contract Clause scrutiny when they change their laws in a manner that drastically alters the terms and conditions of their contractual rights.

The Nation's mining industry needs to know the limit of the government's power to alter legal relationships which supply the industry with the rights to develop its mineral resource base. Last Term, this Court reaffirmed the principle that when the government contracts with its citizens, its rights and duties are governed by the same laws applicable to contracts between its citizens. *United States v. Winstar Corp.*, 116 U.S. 2432, 2464 (1996). This case presents the opportunity to clarify whether the same principle obtains under the Contract Clause where the alteration in State law is directly aimed at the State's self-interest.

A. The Utah Supreme Court's Disregard of Controlling Precedent Creates Improper Uncertainty in Previously Settled Areas of the Law

Just last Term, this Court "consider[ed] the extent to which special rules, not generally applicable to private contracts, govern enforcement of * * * governmental contracts * * *." *United States v. Winstar Corp.*, 116 S.Ct. 2432, 2447-2448 (1996). In *Winstar*, the Court concluded that, when government "contracts are made in reliance on the law of contract," such contracts should be enforced according to their terms. 116 S.Ct. at 2459 (citing Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. Leg. Stud. 83, 88-89 (1977), for the proposition that "parties generally rely on contract law 'to reduce the costs of contract negotiation by supplying contract terms that the parties would probably have adopted explicitly had they negotiated over them' "). The Utah Supreme Court disregarded a prejudgment interest term

provided by "the law of contract" (*Winstar*, 116 S.Ct. at 2459) and, instead, allowed the State of Utah to retroactively treble its contractual entitlement to prejudgment interest. Pet. App. A 8a. This dramatic departure from established principles warrants review.

The Utah Supreme Court's decision creates grave uncertainty regarding a State's ability to alter its contractual rights and obligations. *Winstar* held that the enforcement of government contracts is "dictated by normal principles of contract interpretation." *Winstar*, 116 S.Ct. at 2477 (Scalia, J., joined by Kennedy and Thomas, J.J.); *accord* 116 S.Ct. at 2453, 2459 (opinion of the Court) ("applying ordinary principles of contract construction and breach" to the enforcement of a contract with the federal government). Here, by the express admission of the Utah Supreme Court, the application of "ordinary principles of contract construction and breach" (116 S.Ct. at 2453) would preclude the retroactive trebling of the State of Utah's prejudgment interest award. Pet. App. E 63a (Utah Supreme Court concedes that, "if the [State] lacked authority to set [higher] interest rates and penalties," "under our decision in *SCM Land Co. v. Wakins & Faber*, 732 P.2d 105 (Utah 1986) [the 6% prejudgment interest rate set by] section 15-1-1 would apply"). The Utah court's refusal to apply "ordinary principles of contract construction and breach" to Petitioner's contract seriously undermines what this Court accomplished last Term. *Winstar*, 116 S.Ct. at 2453.

The decision below not only undermines *Winstar*, it flatly conflicts with numerous other pronouncements from this Court. To begin with, the Utah Supreme Court has authorized a dramatic, $4 million, *retroactive* alteration of a contract, contrary to the long-standing judgment that a State's alteration of contractual obligations is unconstitutional when it "work[s] a severe, permanent, and immediate change in [contractual] relationships irrevocably and retroactively." *Allied Structural Steel Co. v. Span-*

naus, 438 U.S. 234, 250 (1978). *Accord, Sturges v. Crowninshield*, 4 Wheat. (17 U.S. 122 (1819); *Ogden v. Saunders*, 12 Wheat. (25 U.S.) 213 (1827) (State insolvency laws may not be applied retroactively).[1]

In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), moreover, this Court established that a State's

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[1] *Accord, Hughes v. State*, 838 P.2d 1018, 1034 (Ore. 1992) (prospective elimination of tax exemption passes constitutional muster, but retroactive elimination of exemption violates Contract Clause); *Whirlpool Corporation v. Ritter*, 929 F.2d 1318, 1321-1323 (8th Cir. 1991) (retroactive application of Oklahoma statute designating current spouse as life insurance beneficiary following a divorce violates the Contract Clause; the statute "effects direct and fundamental changes to pre-existing contracts" and is therefore unreasonable because "individuals are entitled to rely on the law governing insurance contracts as it existed when the contracts were made"); *Geary Distributing Co. v. All Brand Importers, Inc.*, 931 F.2d 1431, 1434 (11th Cir. 1991) (retroactive application of beer distribution statute violates Contract Clause); *Minnesota Association of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare*, 742 F.2d 442, 451 (8th Cir. 1984) (although state may prospectively alter health care reimbursement rates without violating the Contract Clause, it may not do so retroactively; "Because of its retroactivity, the statute imposes totally unexpected liability on nursing homes for charges that were permitted by law when collected" and unconstitutionally "disrupts settled and completed financial arrangements under contracts made in reliance on existing law"). *LaFortune v. Naval Weapons Center Federal Credit Union*, 652 F.2d 842, 847 (9th Cir. 1981) (retroactive application of homestead exemption violates Contract Clause); *Carter v. Government Employees Insurance Co.*, 377 So.2d 242, 243 (Fla. App. 1979) ("It is a well-settled proposition of law that contracts are made in legal contemplation of the existing applicable law," therefore, "[t]o retroactively apply this statute to an insurance contract entered into before its enactment would be an unconstitutional impairment of contract"). *Cf. Blue Cross and Blue Shield of Kansas City v. Bell* F.2d 1331, 1337 (10th Cir. 1986) (statute mandating certain provisions in health insurance policies does not violate the Contract Clause because it "applies only to contracts of insurance issued or renewed" and, therefore, "no sudden, totally unanticipated, and substantially retroactive obligation burdens these contractual relationships").

alteration of its contractual rights violates the Contract Clause unless that alteration is supported by an "important public purpose" and is "reasonable and necessary to serve" that purpose. 431 U.S. at 22. This analysis is almost always fatal "because the State's self-interest is at stake." 431 U.S. at 25-26.[2] Undoubtedly aware of this reality, the Utah Supreme Court attempted to avoid *United States Trust* by announcing that the State's augmentation of its right to damages "did not alter any of the essential elements of the contract." Pet. App. A 8a n.8. But, in its haste to avoid *United States Trust*, the Utah court ran afoul of consistent judgments of this Court dating from at least 1867. *E.g., Von Hoffman v. City of Quincy*, 4 Wall. (71 U.S.) 535, 549 (1867).

The Petition (at 12-19) adequately explicates the well-established rule that laws affecting the "validity, construction, discharge, and enforcement" of contracts—including "the obligations of the debtor to pay interest after the maturity of the debt, where the contract is silent"—are incorporated into *all* contracts and *are* subject to Contract Clause scrutiny. *Von Hoffman, supra*, 4 Wall. (7 U.S.) at 549. It suffices to note, therefore, that the Utah Supreme Court's holding below cannot be squared with decisions from *Von Hoffman* through *General Motors Corp. v. Romein*, 503 U.S. 181 (1992). This bald conflict creates untoward uncertainty in a previously settled (and important) area of the law. The Court should grant review to eliminate that uncertainty.

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[2] *E.g., Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n. 14 (1983) ("When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets"); Schwartz, *Old Wine In Old Bottles? The Renaissance of the Contract Clause*, 1979 Sup. Ct. Rev. 95, 109 (1980) (noting that, in private contract cases "the emphasis on review is on the adjective 'reasonable,'" while "[i]n public contract cases, the emphasis is on the adjective 'necessary'").

B. The Lower Court's Disregard of the Fundamental Mission of the Contract Clause Creates Serious Difficulties for Everyone Contracting with a State

The decision below not only creates legal uncertainty, it has the potential to generate serious economic disruption throughout the Nation. For the first 100 years of this country's existence, the Conract Clause "was the major restraint on state economic regulation." Gerald Gunther, *Constitutional Law* 478 (12th ed. 1991). Although this Court's increasing accommodation of state legislative authority resulted in a gradual loosening of the Clause's strictures (*see, e.g., Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 437-438 (1934),[3] the Clause has never been moribund.[4] The reason why is clear: the

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[3] *E.g., Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 432 (1837) (charter to operate a bridge was not violated by subsequent legislative charter granted to a competitor); *Stone v. Mississippi*, 101 U.S. 814, 817-820 (1880) (no violation of clause even though state-chartered lottery company was rendered valueless by subsequent abolition of lotteries); *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 667-670 (1878) (state may enact legislation regulating transportation of fertilizer notwithstanding prior charter granted to fertilizer company).

[4] *Blaisdell* is widely cited as the wellspring of the modern, lenient interpretation of the Contract Clause. *E.g.*, Gerald Gunther, *Constitutional Law* 478-479 (12th ed. 1991). Examination of *Blaisdell*, along with decisions rendered shortly after that opinion, however, indicates that the *Blaisdell* Court did not intend to eviscerate the Contract Clause. Although extending the contractual period for mortgage redemption (compare U.S. Const., Art. I, § 10, cl. 1), the Court emphasized the emergency nature of the legislation (290 U.S. at 425, 439-430, 444-445) and expressly emphasized that the statute was only a "limited and temporary interposition" that granted "temporary relief" by means of a "temporary and conditional restraint." 290 U.S. at 439-40. And, a mere four months after *Blaisdell*, the Court invalidated a state law under the Contract Clause that was not intended to deal temporarily with an emergency. In *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934), Chief Justice Hughes (who authored *Blaisdell*) wrote for the Court that an Arkansas law that exempted most life insurance policy payments from garnishment violated the Contract Clause because

protection of contractual rights and duties was central to the Founder's conception of liberty.[5] The Utah Supreme Court's blatant disregard of a previously unquestioned contractual right and duty (*e.g.*, "the obligation[] of the debtor to pay interest after the maturity of the debt [at a statutory rate] where the contract is silent," *Von Hoffman, supra*, 4 Wall. (71 U.S.) at 459) creates serious difficulties for everyone—and particularly the members of the National Mining Association—who must do business with a State.

The Utah court has decreed that Petitioner cannot expect that its contract with the State of Utah will be governed by the same rules applicable to other, private contracts. Pet. App. A 8a & n.8 (court concludes that Utah may retroactively treble its damage recovery, a power accorded no other contracting entity, without impairing "any of the esential elements of the contract"). This

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it was "neither temporary nor conditional." 292 U.S. at 433-434. *See also W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 63 (1935) (invalidating another Arkansas statute limiting contractual rights because it was not carefully limited in duration) (Cardozo, J.); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 597-598 (1935) (invalidating a provision of the federal Bankruptcy Act on retroactivity grounds and distinguishing *Blaisdell*) (Brandeis, J.); *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 197 (1936) (invalidating Louisiana statute on Contract Clause grounds); *Wood v. Lovett*, 313 U.S. 362 (1941) (invalidating state law, enacted after the sale of state lands, that adversely affected title to the lands). The Court that decided *Blaisdell*, therefore, certainly did not believe that the Contract Clause was an ineffective (or even minor) limit on State legislative authority.

[5] The Framers attached significant importance to the protection of property rights. *The Federalist* No. 10 (Madison) at 78 (C. Rossiter ed. 1961) ("the protection of [the] faculties of acquiring property is "the first object of government"). The Clause, together with prohibitions against bills of attainder and ex post facto laws (also contained in Article I, Section 10, Clause 10 of the Constitution), was intended as a "constitutional bulwark in favor of personal security and private rights." *The Federalist* No. 44 (Madison) at 282 (C. Rossiter ed. 1961).

patently unconstitutional result harms not only Petitioner, it threatens serious nationwide injury. If followed outside Utah, this analysis will injure every entity executing a contract with a State.

This Court, in construing the Contract Clause, has already noted that "[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised." *United States Trust Co., supra*, 431 U.S. at 25-26. Absent review, the Nation's mining industry will become a ready target for States interested in raising painlessly (at least from the ordinary taxpayer's perspective) "extra money." *Id.* In the context of the various business affiliations between *Amicus'* Members and numerous States—the range of which extends from the leasing of State lands and minerals to the sale of mineral products to State facilities—the respective rights and obligations are memorialized in contracts that, among other things, establish the rights and remedies available upon contractual breach. If, as the Utah Supreme Court has decreed (Pet. App. A 8a), these States are now free to alter at will the "remedial" provisions of their contracts without running afoul of the Contract Clause, the core mission of the Contract Clause—to prevent "sudden changes and legislative interferences[] in cases affecting personal [economic] rights" *The Federalist* No. 44 (Madison) at 282 (C. Rossiter ed. 1961))—will be eviscerated.

The ensuing disruption of legitimate economic expectations, moreover, will be substantial. The mineral leases under which Members of the Association operate are often intricate, ambiguous and incorporate detailed state and federal regulations ranging from environmental protection to miners' safety and health.[6] And, as in this case, the breach of these multifarious obligations may incur unintentionally and despite the good faith of the breaching party. *See, e.g.*, Pet. App. A 4a (Petitioner

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[6] *See* 3 *Am. L. of Mining* § 63.05 (2d ed. 1984).

held to have breached royalty payment obligation even though "various [State] employees apparently informed [Petitioner] that 15 cents per ton was the correct rate for the lease").

As a result, opportunities for the States to raise additional funds from the pockets of "breaching" promisors will abound, often despite the best efforts and diligent good faith of the "breaching" parties. Cash-starved States throughout the Nation should not be allowed the opportunity (accorded by the decision below) to survey their existing portfolio of contracts with the clear goal of retroactively augmenting their economic rights. Such an effort undoubtedly occurred here. Pet. App. A 4a (after informing Petitioner that it had paid "the correct rate for the Lease," the State of Utah nevertheless "conducted an audit" to determine whether the "passage of the Federal Coal Leasing Amendments and accompanying regulations" had imposed "a duty to pay" a significantly higher royalty). Such an effort, just as undoubtedly, is unconstitutional.

Alexander Hamilton summarized the views of the Founders when he stated that laws impairing the obligation of contract are "atrocious breaches of moral obligation and social justice." *The Federalist* No. 7 (Hamilton) at 65 (C. Rossiter ed. 1961).[7] The Court should review the State of Utah's retroactive imposition of $6 million in damage liability upon Petitioner to restore Contract Clause protection to those who contract with the State of Utah and to prevent the serious constitutional

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[7] Elbridge Gerry, in fact, argued that the Contract Clause should apply to the *federal* government because preserving contractual obligations was a matter of "public faith." 2 *Records of the Federal Convention of 1787* at 619 (Farrand ed. 1911). *Cf. United States v. Winstar*, 116 S.Ct. at 2455 ("[a]lthough the Contract Clause has no application to acts of the United States. * * * it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights").

injuires that—absent review—the Utah Supreme Court's disregard of that protection could well inflict elsewhere.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

TRAIL MOUNTAIN COAL COMPANY,
Petitioner,
v.

THE UTAH DIVISION OF STATE LANDS AND FORESTRY; RALPH MILES, DIRECTOR OF THE DIVISION OF STATE LANDS AND FORESTRY; THE UTAH DEPARTMENT OF NATURAL RESOURCES; DEE HANSEN, EXECUTIVE DIRECTOR OF THE UTAH DEPARTMENT OF NATURAL RESOURCES,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Utah

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PARTIES TO THIS PROCEEDING

All parties to this proceeding are listed in the caption. Sup. Ct. R. 14(1)(b). Pursuant to Sup. Ct. R. 29.6, Petitioner submits the following supplemental statement regarding the ownership of Trail Mountain Coal Company:

> At the time the Respondent Utah Division of State Lands and Forestry conducted the 1985 coal production audit, Petitioner Trail Mountain Coal Company was a wholly-owned subsidiary of Arch Mineral Corporation. Although Arch Mineral Corporation subsequently sold Trail Mountain Coal Company, the contractual liability at issue here remains an obligation of Arch Mineral Corporation.

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INTRODUCTION

"[C]hanges in the laws that make a contract legally enforceable" (*General Motors Corp. v. Romein*, 503 U.S. 181, 189 (1992)), such as the alteration of statutes establishing "the obligation[] of the debtor to pay interest after the maturity of the debt, where the contract is silent" (*Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 550 (1867)), "trigger Contract Clause scrutiny if they impair the obligation of pre-existing contracts." *Romein*, 503 U.S. at 189. Here, a statutory 6% prejudgment interest rate that otherwise "would apply" to Petitioner Trial Mountain's contract (Pet. App. E 63a) has been displaced by new interest rates that increase the company's damage obligation by over $4 million. Trail Mountain Pet. 4-5.[1] This is plainly unconstitutional. *Morely v. Lake Shore & Mich. S. Ry.*, 146 U.S. 162, 168 (1892) (Contract Clause prevents retroactive alteration of prejudgment interest statutes). "The power to tax involves the power to destroy. * * * The power to modify at discretion the remedial part of a contract is the same thing." *Edwards v. Kearzey*, 96 U.S. 595, 602 (1878) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). None of the contentions in the State's Brief in Opposition ("Opp.") justify disregard of this constitutional reality.

I. TRAIL MOUNTAIN'S CONTRACT WAS IMPAIRED

Because Trail Mountain's contract was "issued subject in all respects to and under the conditions of the laws of the State of Utah and existing rules and regulations and such operating rules and regulations as may be hereafter approved and adopted by the State Land Board" (Resp. App. A 2a), the State argues "that there was no impairment of contract * * * because the contract itself permitted the State to act as it did." Opp. 12. The State also asserts that, as a participant in a regulated industry, Trail

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[1] The State implies that a mere "$1,854,115.69 in interest" is involved. Opp. 5. The record belies this tacit misrepresentation. The State has claimed $6,105,638.22 in interest (Pet. App. H 85a), not the $2,070,955.63 accrued under the 6% rate. Pet. App. C 32a.

Mountain took "the risk of future legislation." Opp. 14 (*citing Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940)). These arguments are seriously flawed.

A. The Lease Does Not Grant The State Unfettered Authority To Alter The Mineral Lease, And The Modification Impaired Trail Mountain's Reasonable Expectations

The Lease does not allow the State to alter contractual terms at will. To begin with, the Lease was "granted subject in all respects to and under the conditions of the laws of the State of Utah." Opp. App. A 2a. This language, of course, expressly incorporates the 6% prejudgment interest rate of Utah Code Ann. § 15-1-1. Pet. App. E 73a (Bench, J., dissenting) ("[c]onsistent with the [State's] own analysis, the lease * * * is governed by section 15-1-1."). And, although the Lease is also subject "to existing rules and regulations" of the State Land Board and "such operating rules and regulations as may be hereafter approved" (Opp. App. A 2a), neither clause permits the State to modify the incorporated 6% interest rate.

When the Lease was granted in 1965, none of the Board's regulations addressed prejudgment interest or penalties for delinquent payments. The only monetary issues addressed in the regulations were application, bonding, and assignment fees, and rentals and royalties. Rules and Regulations Governing the Issuance of Mineral Leases (as amended October 13, 1966) (hereafter "Board Rules"), lodged with the Clerk of the Court. The Board did not undertake regulation of prejudgment interest or contractual penalties until 1982, some 17 years after it issued the Lease. Pet. 2, 4. Accordingly, the fact the Lease is subject to "to existing [*i.e.*, 1965] rules and regulations" (Opp. App. A 2a) hardly aids the State.

Nor does the fact that the Lease is subject to "such operating rules and regulations as may be hereafter approved" (Opp. App. A 2a) further the State's cause. "Operating rules and regulations" refer to regulatory pro-

visions that control the manner in which mines are operated.[2] The fact that the State has reserved a contractual right to apply future *operational* rules and regulations to an existing lease hardly confers upon the State the "power to modify at discretion the remedial part of a contract." *Edwards*, 96 U.S. at 602.

That mining is a regulated industry, finally, does not alter the above analysis. Although participants in a regulated industry may be on notice of possible future changes in state law, that notice is not limitless. Quite the opposite. This Court's decisions merely establish that "[w]hen [a party has] purchased into an enterprise *already regulated in the particular to which he now objects*, he purchased subject to further legislation *upon the same topic*." *Veix*, 310 U.S. at 38 (emphasis added).[3] When the Lease was issued in 1965, the State Land Board simply did not regulate leases "in the particular to which [Trail Mountain] now objects." *Id.* Instead, this "particular" was governed by Utah Code Ann. § 15-1-1(2), which provided that, "[u]nless the parties to a lawful contract specify a different rate of interest, the legal rate of interest * * * *shall* be 6% per annum." (Emphasis added). Trail Mountain, despite the State's protestations, had a

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[2] *See, e.g.*, Board Rule 24(c) (providing that "[t]he exploration for and the mining or recovery of salts from the surface of State lands * * * shall be conducted in such a manner as not to cause * * * the seepage of brines from one strata to another").

[3] *Accord Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 415 (1983) (cited at Opp. 9, 11, 14, 15) (retroactive application of gas price regulations did not violate Contract Clause only because, "at the time of the execution of the contracts, ERG did not expect to receive deregulated prices"); *Holiday Inn Franchising v. Branstad*, 29 F.3d 383, 384 (8th Cir.) (prior prospective regulation of franchises provided no fair warning that state would alter law retroactively), *cert. denied*, 115 S.Ct. 613 (1994); *Garris v. Hanover Ins. Co.*, 630 F.2d 1001, 1007 (4th Cir. 1980) (regulation of insurance industry did not alter impairment analysis because issue involved was "outside the [prior] range of state regulatory interest").

"reasonable expectation of a particular interest rate applying in the future." Opp. 15.[4]

B. The Contractual Power Asserted By The State Conflicts With Established Authority And Merits Review

The State's submission that it may alter the terms of its own contract is not only belied by the Lease, it conflicts with recent Court pronouncements. Rather than demonstrating this case's unimportance, the State's principal argument underscores the pressing need for review.

In *Romein*, this Court rebuffed the notion that the Contract Clause can be "entirely dependent on state law." 503 U.S. at 190. The Contract Clause, the Court wrote, cannot be avoided by legislatively providing " 'that all contracts thereafter made should be subject to the entire control of the legislature.' " 503 U.S. at 191 (quoting 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1383, pp. 252-53 (5th ed. 1891)). Similarly, in *Coombes v. Getz*, 285 U.S. 434, 440 (1932), although State law provided that "[a]ll laws now in force * * * concerning corporations * * * may be altered from time to time or repealed," the repeal of a law rendering corporate directors contractually liable for corporate embezzlement did not reduce contractual liability for wrongs occurring prior to the repeal. "The authority of the state under the so-called reserved power is wide" but "not unlimited" and cannot be invoked to impair "the obligation of contracts." *Coombes*, 285 U.S. at 441-42.[5]

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[4] Utah's historical treatment of prejudgment interest, moreover, reinforces that expectation. An amendment *increasing* the rate of prejudgment interest under Utah Code Ann. § 15-1-1 is inapplicable to contracts negotiated *before* the effective date of the amendment, even though the contractual breach may have occurred *after* the higher rate has taken effect. *See, e.g., SCM Land Co. v. Watkins & Faber*, 732 P.2d 105, 109 (Utah 1986) (awarding prejudgment interest at six rather than ten percent because the "lease that was breached was executed prior" to the increase in the legal rate).

[5] *Accord Edwards*, 96 U.S. at 598, 604 (rejecting argument that legislation altering preexisting contracts never violates the Con-

Perhaps most importantly, the Court denied the United States last Term the very power claimed here: to avoid contractual language "merely by passing any 'regulatory statute.'" *United States v. Winstar*, 116 S.Ct. 2432, 2464 (1996). The Court denied the federal government this limitless ability, not only because of "concern with governmental self-interest" (*id.* at 2466 n.41) (Souter, J., joined by Stevens and Breyer, J.J.), but also because such a result "would flaunt the general principle that '[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'" *Id.* at 2464 (*quoting Lynch v. United States*, 292 U.S. 571, 579 (1934)). *Accord id.*, 116 S.Ct. at 2477 (Scalia, J., joined by Kennedy and Thomas, J.J., concurring) (the effect of government contracts is "dictated by normal principles of contract interpretation").

Neither party to an ordinary contract would be granted the right to "change the interest rates to be applied upon [contractual] default." Opp. 15. *Winstar* counsels that this raw power should not be conferred on the States. *See Morely*, 146 U.S. at 168 (states may not retroactively alter prejudgment interest statutes). Because the rules announced in *Winstar* were drawn from the "application of the Contract Clause to public contracts" (116 S.Ct. at 2454), review is warranted to ensure that neither the federal government nor Utah is free to alter contract rights through action "tainted by a governmental object of self-relief." *Winstar*, 116 S.Ct. at 2465.

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tract Clause because "[t]he safety and health of the Commonwealth are above private right;" this "claim for the retrospective efficacy of * * * [state] laws cannot be supported"). *See also Continental Ill. Nat. Bank and Trust Co.*, 696 F.2d 692, 698-99 (9th Cir.) (State cannot impair the contractual provisions of bonds even though the bonds, as issued, were subject to "provisions of law as now or hereafter in effect"), *appeal dismissed*, 460 U.S. 1077 (1983); *Garris*, 630 F.2d at 1007 (State may not impair an insurance company's contract with an agent even though the company was statutorily required to "perform all duties now or hereafter prescribed by law").

II. *ROMEIN* IS FULLY APPLICABLE AND MANDATES REVIEW

The State struggles in vain to avoid the clear conflict between the opinion below and *Romein*. The "touchstone for Contract Clause analysis under *Romein*" is *not* whether State action "convert[s] a previously enforceable contract into a 'mere promise' " (Opp. 8), nor is that case limited to State infringement upon the "ability to enforce the bargained-for-terms" of a contract. Opp. 15. Rather, *Romein* clarified that *any* "changes in the laws that make a contract legally enforceable" will violate the Contract Clause "if they impair the obligation of pre-existing contracts, *even if they do not alter any of the contracts' bargained-for terms.*" *Romein*, 503 U.S. at 189 (emphasis added). An impairment of contract " 'necessarily' " exists, moreover, if " 'any subsequent law affect to diminish the duty, or to impair the right' " of a party to the contract. *Id.* (*quoting McCracken v. Hayward*, 2 How. 608, 612 (1844)).

Here, a 6% prejudgment interest term was incorporated in Trail Mountain's contract [6] and Trail Mountain had a reasonable expectation that this term would be enforced. Section I(A). The State's retroactive displacement of the term has trebled Trail Mountain's prejudgment interest obligation, "thereby impairing the contract's obligatory force." *Romein*, 503 U.S. at 189. The decision below simply disregards this analysis. That disregard demands review.

III. THE STATE'S NEWLY IMPOSED RATES ARE RETROACTIVE

The claim that the State's interest rates are not retroactive is, to repeat a phrase, "misleading at best." Opp. 16. The rates not only unilaterally changed the terms of a contract executed 17 years earlier, the rates have been applied to "remedy" a contractual breach that occurred three years before their adoption and six years before

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[6] While the State "assumes" the fact *"arguendo"* (Opp. 14), the Utah Supreme Court conceded that the 6% rate "would apply" absent retroactive regulatory action. Pet. E 63a.

Trial Mountain could have even been aware of the breach. Retroactivity, here, is clear. *Landgraf v. USI Film Prods.*, 114 S.Ct. 1483 (1994).

The royalty clause of Trail Mountain's contract is not as "unambiguous" as the State asserts. Opp. 17 n.8. Quite the contrary; the trial court initially concluded that the clause was impermissibly vague and, therefore, unenforceable. Pet. App. E 45a. Furthermore, as recognized by the Utah Supreme Court (App. A 4a), from at least 1979 through the completion of the State's 1985 audit, State employees repeatedly assured Trail Mountain that 15¢ per ton (rather than 8% of the value of coal produced) was the appropriate royalty. R. 2123.[7] There is, therefore, absolutely no support for the State's assertion that Trail Mountain "should have known from the beginning of [its] obligation to pay * * * the higher 8% rate." Opp. 17 n.8. Trail Mountain had no such knowledge (nor could it have) until the State announced (at the conclusion of the 1985 audit) that it was dramatically reinterpreting the Lease's royalty clause. Pet. at 3-5.

The State has nevertheless applied the Board's rates to calculate Trail Mountain's damage liability for a breach beginning in 1979 (three years before the rates were adopted) that continued through 1985—the first time Trail Mountain could have even been aware of the breach. Opp. 16 (conceding the rates have been applied to "Trail Mountain's outstanding delinquent balance"). This is not a situation where new regulations have been "applied prospectively to an existing contract." Opp. 16. As this Court recently explained, a law is retroactive if "the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 114 S.Ct. at 1499. That is what has happened here. The State of Utah has "change[d] * * * the law[] that make[s] a contract legally enforceable" and has applied that law to "impair the obligation of [a] pre-existing contract[]." *Romein*, 503 U.S. at 189.

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[7] "R. 2123" refers to the paginated record before the Utah Supreme Court.

IV. UTAH'S PROFFERED JUSTIFICATIONS FOR ALTERING THE LEASE DO NOT MEET THE HIGH STANDARD APPLICABLE TO A STATE'S MODIFICATION OF ITS OWN CONTRACTS

The State's frail submission that any impairment of Trail Mountain's contract passes constitutional scrutiny (Opp. 18-21) is unavailing for four reasons. First, the applicable Contract Clause analysis is not the deferential "reasonableness" inquiry articulated by the State. Opp. 18, 20. It is, rather, the searching scrutiny " 'appropriate because the State's self-interest is at stake.' " *Winstar*, 116 S.Ct. at 2466 n.41 (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977)). Second, even granting the State's duty to recover "full value" for school trust property (Opp. 18-20), that duty (for the reasons articulated in the Petition at 23-28) does not validate the retroactive trebling of Trail Mountain's prejudgment interest obligation.

Third, the State's assertion that its retroactive rates are "reasonable" (Opp. 19-20) is belied by the face of the Lease. The fact that the State might receive prejudgment interest at rates currently "below market" (Opp. 19) does not render Utah's retroactive displacement of the 6% contractual interest rate "reasonable." The Utah Code gave the State the power to negotiate whatever prejudgment interest rate (including a floating rate) that it determined was appropriate in light of the circumstances in 1965. Utah Code Ann. § 15-1-1(1) (parties may agree upon "any rate of interest"). The allocation of risks for nonperformance adopted by the State in 1965, when it bypassed the opportunity to negotiate rates and instead relied upon the 6% term, cannot be undone simply because (in hindsight) the State regrets that action. *Cf. Winstar*, 116 S.Ct. at 2458 (federal government cannot escape a "risk-shifting agreement[]" later deemed improvident).

The State, in any event, has ample contractual power under the terms of the Lease to protect itself against any "unforseen" rise in "market rates." Opp. 17. After

20 years, the Lease specifically provides for "readjustment of terms and conditions * * * as the Lessor may determine to be necessary in the interest of the State." Resp. App. A 2a. This clause—if invoked[8]—would have permitted the State to reissue and adjust the Lease in 1985 to apply to any future breach the rates the State adopted in 1982. *See* Utah Admin. Code R. 850-200-4000(1)(a) ("failure * * * to accept the terms of any readjustment * * * shall subject the lease to forfeiture"). Because the State had the contractual power to protect itself against the "unforseen" events raised by the Opposition (at 17-20), the State's retroactive impairment of the Lease is hardly "reasonable."[9]

Fourth, and finally, the claim that the contractual impairment should be upheld because "[i]t is difficult to find sympathy for Trail Mountain" has a particularly hollow ring. Opp. 17. Trail Mountain had a reasonable expectation that, upon breach, any prejudgment interest would accrue at 6%. Section I. That expectation, under the decisions of this Court, is constitutionally protected. Section II. Trail Mountain, furthermore, could not have known that it was even in breach until 1985—three years *after* the Board promulgated its retroactive rates. Section III. Nevertheless, Utah has adamantly insisted on retroactively collecting these rates.

Little wonder that Trail Mountain has pursued an "unremitting litigation strategy." Opp. 17. The "strategy," however, has not been "to avoid paying the school

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[8] A contractual right to mineral lease readjustment must be properly invoked at the end of the appropriate time period or it is waived. *See, e.g., Rosebud Coal Sales Co., Inc. v. Andrus*, 667 F.2d 949, 953 (10th Cir. 1982).

[9] Lease readjustment is the kind of permissible, prospective action discussed at page 16 of the State's Opposition. *See In re Workers' Compensation Refund*, 46 F.3d 813, 819 (8th Cir. 1995) (allowing new statute to govern *future* economic transactions between the State and its contractors because, "[u]nlike retroactive amendment, prospective amendment does not affect settled plans or arrangements").

trust anything." *Id.* Rather, the "strategy" merely has been to prevent Utah from unconstitutionally impairing the Lease in its own favor. Trail Mountain will pay Utah its due—but not its unconstitutional due.

V. REVIEW IS MANDATED TO PRESERVE FUNDAMENTAL CONSTITUTIONAL PRINCIPLES UTAH HAS IGNORED

Utah's final argument is that the case "involves the interpretation of a state mineral lease," not the Contract Clause. Opp. 21-22. The State errs. As recognized in *Romein* (503 U.S. at 187), whether a contract has been made, whether it has been impaired, and whether the impairment is constitutional are questions of federal—not state—law. *Irving Trust Co. v. Day*, 314 U.S. 556, 561 (1942); *American Toll Bridge v. Railroad Comm'n*, 307 U.S. 486, 490 (1939); *Rapid Transit Corp. v. New York*, 303 U.S. 573, 595 (1938); *Coombes*, 285 U.S. at 441; *Appleby v. City of New York*, 271 U.S. 364, 380 (1926). And, as shown in this Reply and the Petition, the opinion below does violence to established precedent controlling these questions. This case, therefore, turns upon "substantial constitutional principles." Opp. 21. The State simply invites the Court to ignore those principles.

The State's invitation should not be accepted. As Chief Justice John Marshall wrote, the limitations of Art. I, § 10, which include the Contract Clause, operate upon the States "in the nature of a bill of rights." *Barron v. City of Baltimore*, 7 Pet. (32 U.S.) 243, 248 (1833). The State of Utah has disregarded a fundamental limit on its own power. The Court should grant review to maintain that limit as part of "our written Constitution." *United States Trust*, 431 U.S. at 16.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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